TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 427

FREDERICK W. WADE, PETITIONER,

vs.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1948.

CERTIORARI GRANTED JANUARY 10, 1949.

Proceedings in the United States Court of Appeals.

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1948, of said Court, before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

On the 30th day of September, A. D. 1947, a transcript of the record, pursuant to a notice of appeal, filed in the District Court of the United States for the District of Kansas, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, was appellant, and Frederick W. Wade was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 3575.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, APPELLANT,

vs.

FREDERICK W. WADE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

FILED SEPTEMBER 30, 1947.

INDEX.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 3575.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, APPELLANT,

vs.

FREDERICK W. WADE, APPELLEE.

Statement of Points Relied Upon by the Appellant.

1.

That petitioner, appellee, was not placed in double jeopardy, as contemplated by the Fifth Amendment to the Constitution, in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat condition of the United States in a state of war prevented its completion.

2.

That the Court-martial by which appellee was convicted, sentenced and subsequently committed, convened at Bad Neuenahr, Germany, 30 June, 1945, did not lack jurisdiction to try appellee in that such proceeding was in violation of the Fifth Amendment though identical charge and specification had been previously submitted to another Court-martial for trial and had been partially tried but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United States in a state of war.

3.

That the Trial Court erred in overruling appellant's motion for reconsideration.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Appellant.

Filed October 6, 1947.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE ARTHUR J. MELLOTT, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

FREDERICK W. WADE, PETITIONER,

vs.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, RESPONDENT.

Civil—No. 980 H. C.

Petition for Writ of Habeas Corpus.

To the Honorable Arthur J. Mellott, Judge of the United States District Court for the District of Kansas:

1 Your petitioner, Frederick W. Wade, respectfully represents:

1. That he is (and was during all the time herein mentioned) a citizen of the United States of America and a citizen of the State of Washington.

2. That Walter A. Hunter is the duly appointed and acting Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

3. That the jurisdiction of the United States District Court is invoked under the Constitution of the United States and the statutes of the United States based upon the fact that petitioner is unconstitutionally and unlawfully deprived of his liberty as hereinafter set out, and that this Court is invested with jurisdiction to entertain this petition pursuant to 28 U.S.C.A., Sec. 451.

4. That petitioner is unjustly and unlawfully deprived of his liberty and detained and imprisoned in the United States Penitentiary at Fort Leavenworth, Kansas, by Walter A. Hunter, warden of said penitentiary, under color of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated January 10, 1946, a copy of which is hereto attached marked Exhibit "A"; and which order is illegal and void for reasons hereafter set out.

5. That petitioner, while serving in the Armed Forces of the United States in Germany, as a member of Company K, 385th Infantry, 76th Infantry Division, he was, on March 16, 1945, arrested and, on March 18, 1945, charged with violation of the 92nd Article of War, the specification being that he did, at Krov, Germany, on or about 14 March, 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

6. That petitioner is innocent of the charge.

7. That on March 27, 1945, at Pfalzfeld, Germany, petitioner was tried upon said charge by a duly constituted 76th Infantry Division General Court Martial, that evidence was introduced on behalf of the United States and on behalf of the petitioner, that the United States, petitioner, and the court martial stated that they had nothing further to offer, that the court martial was closed and deliberations commenced, that thereafter, the court martial reopened the Court and instructed the Trial Judge Advocate to produce further evidence and continued the case for the purpose of receiving further evidence.

8. That on April 3, 1945, without the knowledge and consent of petitioner, and without lawful cause or necessity, said charges were withdrawn from said 76th Infantry Division General Court Martial by the appointing authority and referred to the Commanding General, Third United States Army; and on April 18, 1945, without the knowledge and consent of petitioner, referred to the Commanding General, Fifteenth United States Army.

9. That on April 26, 1945, without the knowledge or consent of petitioner, the Commanding General, Fifteenth United States Army, referred said charges to Captain Mil-

ton J. Mehl, MAC, Headquarters, Fifteenth United States Army Trial Judge Advocate of General Court Martial appointed by Paragraph 1, Special Order No. 81, Headquarters, Fifteenth United States Army, dated 21 April, 1945, that by said order or an amended or subsequent order, Richard T. Brewster, Major, Cavalry, O-320117, and Henry T. Dunck, Captain, CAC, O-418573, were appointed Defense Counsel, and were furnished certain papers in the case which did not disclose the prior trial of petitioner; and that said Defense Counsel upon interviewing petitioner, learned for the first time that petitioner had been previously tried by a General Court Martial for the same offense.

10. That petitioner was on June 30, 1945, brought before a Fifteenth United States Army General Court Martial and arraigned upon the identical charge and specification upon which he was tried by the 76th Infantry Division Court Martial.

11. That petitioner at the first opportunity filed and presented his plea in bar of trial on the ground of former jeopardy and in support thereof introduced into evidence the certified record of the former trial; and thereafter said Court Martial lacked jurisdiction to again put petitioner in jeopardy by trial for the same offense.

3 12. That the Trial Judge Advocate, in opposition to said plea in bar, presented a written brief and oral statement containing misleading and erroneous statements of fact and law to the General Court Martial upon the issue of former jeopardy.

13. That the General Court Martial relying upon said misleading and erroneous statements erroneously overruled said plea in bar.

14. That petitioner thereupon pleaded not guilty and evidence was introduced until both prosecution and the defense stated they had no further testimony to offer; final arguments were made; and the Court was closed to deliberate upon its findings.

15. That the Court Martial, by a divided court, rendered a verdict of guilty and sentenced petitioner to be dishon-

orably discharged from the Service, to forfeit all pay all allowances due or to become due, and to be confined to hard labor, at such place as the reviewing authority may direct, for term of his natural life.

16. That petitioner, by written brief prepared by his Defense Counsel, requested that the record be reviewed carefully with a view of correcting a grave injustice and suggested to the reviewing authority, that it might be appropriate to confer with members of the Court Martial and with witnesses, including petitioner. Said brief further stated: "The plea in bar in this case should have been sustained for the reasons set out in argument on the plea, R. 7-12. Without access to law books, it is impossible adequately to present the law. However, in the event the reviewing authority permits the verdict of guilty to stand, we ask permission to associate United States resident counsel to brief and present the law to the proper authority."

17. That the reviewing authority, ex parte, erroneously affirmed the conviction but reduced the sentence from life imprisonment to twenty (20) years imprisonment.

18. That petitioner's Defense Counsel thereafter orally and by written brief presented the issue of former jeopardy to Board of Review No. 4, Branch Office, Judge Advocate General's Department, to which board said case had been referred.

19. That said Board of Review No. 4, a judicial body composed of just and free men, trained in the law, held that the evidence was legally insufficient to support the conviction by reason of former jeopardy.

4 20. That thereafter the Assistant Judge Advocate General, European Theater, arbitrarily and capriciously and without foundation in fact or law and without the knowledge of petitioner or Defense Counsel and without giving petitioner an opportunity to be heard, or represented by counsel, and upon an opinion which the Secretary of War, through his authorized representatives, has refused and still refuses to furnish petitioner though repeatedly requested to do so, dissented from said opinion of Board of Review No. 4.

21. That thereafter the Commanding General, United States Forces, European Theater, on January 10, 1946, and, petitioner states on belief, without consideration of the record or the law, or the opinion of the Board of Review No. 4, and without the knowledge of petitioner or his Defense Counsel (prior to the issuance of the order) and without giving petitioner an opportunity to be heard or represented by counsel, and without foundation in fact or law, sustained the dissent of the Assistant Judge Advocate General and issued general court martial order No. 2, heretofore referred to in Paragraph 4.

22. That petitioner upon learning of the action of the Commanding General, United States Forces, European Theater and the action of the Board of Review No. 4 and the action of the Branch Judge Advocate General, appealed to the Secretary of War to exercise the power and duty vested in him by law to correct the manifest injustice done to petitioner, and release him from unlawful custody and restraint, but that the Secretary of War has failed and refused to act and failed and refused to furnish petitioner with the opinions in his case.

23. Petitioner states that he was furnished an incomplete copy of the record of trial; that he does not have a complete record because of the omissions resulting from the actions and failure to furnish a complete record on the part of the Secretary of War and the Commanding General Fifteenth United States Army and their representatives.

24. Petitioner further shows that his detention and imprisonment, as aforesaid, is illegal and void in this, to-wit:

A. That the Fifteenth Army General Court Martial was without jurisdiction by reason of former jeopardy to try the petitioner and that its finding and sentence were a nullity.

B. That petitioner was tried twice for the same offense in violation of the Constitution of the United States and more particularly the Fifth Amendment thereof and in violation of the laws of the United States and more particularly the Fortieth Article of War (10 U.S.C.A., Sec. 1511).

C. That the Court Martial Order, Headquarters Fifteenth Army, confirming the finding of guilty and confirming the sentence as modified was illegal and void for lack of jurisdiction.

D. That the action of the Branch Judge Advocate General, European Theater, in dissenting from the opinion of Board of Review No. 4 was arbitrary, capricious and illegal and violated petitioner's constitutional right to assistance of counsel in his defense.

E. That the action of the Commanding General, European Theater, in confirming the Court Martial Order Headquarters Fifteenth Army, was void for want of jurisdiction and was the result of arbitrary, capricious and unconstitutional acts in that petitioner was denied the assistance of counsel in the proceedings before said Commanding General.

F. That Court Martial Order No. 2, Headquarters United States Forces, European Theater, dated January 10, 1946, was illegal and void for want of jurisdiction by reason of double jeopardy.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that Writ of Habeas Corpus directed to the said Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, may issue in his behalf, so that your petitioner may be forthwith brought before this Court to do, submit to, and receive what the law may direct.

6

R. T. BREWSTER,

N. E. SNYDER.

Affidavit.

State of Kansas, ss:

Frederick W. Wade, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him, that he has read the same and knows

the content thereof; and the said statements are true as he verily believes.

FREDERICK W. WADE.

Sworn to by said Frederick W. Wade on this 3rd day of September, 1946.

C. H. LOONEY,
Associate Warden Authorized by Act of February 11, 1938, to administer oaths.

Filed September 6, 1946.

Exhibit A.

9 Restricted.

63023 20 yrs. Carnal Knowledge.

Headquarters U. S. Forces, European Theater.

General Court-Martial Order No. 2 10 January, 1946.

Before a general court-martial which convened at Bad Neuenahr, Germany, on 30 June and 1 July, 1945, pursuant to paragraph 1, Special Orders No. 143, Headquarters Fifteenth United States Army, 23 June, 1945, as amended by paragraph 1, Special Orders No. 146, Headquarters Fifteenth United States Army, 26 June, 1945, was arraigned and tried:

Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry.

Charge: Violation of the 92nd Article of War.

Specification: In that Private First Class Frederick W. Wade, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March, 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

Pleas.

To the Specification and the Charge: Not guilty.

Findings.

Of the Specification and the Charge: Guilty.

Sentence.

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. (Two previous convictions considered.)

The sentence was adjudged on 1 July, 1945.

The action of the reviewing authority is:

"Headquarters Fifteenth U. S. Army, Office of the Commanding General, APO 408, 24 July, 1945.

In the foregoing case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, the sentence is approved but the period of confinement is reduced to twenty (20) years. The United States Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.

Restricted.

L. T. GEROW,
10 Lieutenant General, U. S. A. Commanding."

The sentence thereby having been approved by the reviewing authority and the record of trial having been examined by the Board of Review in the Branch Office of the Judge Advocate General with the United States Forces, European Theater, and the Board of Review having substituted its opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence to the Assistant Judge Advocate General in charge of said Branch Office, and the Assistant Judge Advocate General having dissented from the opinion of said Board of Review, and the record of trial, the opinion of the Board of Review and the dissent of said Assistant Judge Advocate General having been submitted to the Commanding General, United States Forces, European Theater, under the third paragraph of Article of War 50½, and the said

Commanding General having considered the record of trial, the opinion of the Board of Review and the dissent of the Assistant Judge Advocate General the following are his orders hereon:

"Headquarters United States Forces, European Theater.

In the foregoing case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, the sentence is hereby confirmed. Article of War 50½ having been complied with said sentence will be duly executed. The United States Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement, or elsewhere as the Secretary of War may direct.

JOSEPH T. MCNARNEY,
General, U. S. Army Commanding.

21 December, 1945."

By Command of General McNarney:
11 H. R. BULL,
Major General, GSC, Chief of Staff.

Official: (Official Stamp.)

L. S. OSTRANDER,
Brigadier General, USA, Adjutant General.

Distribution: M

Restricted.

Respondent's Return.

7 Comes now Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, through James W. Wallace, Assistant United States Attorney for the District of Kansas, and, for his answer and return to the petition for writ of habeas corpus filed herein, states to the Court as follows:

1. Respondent denies each and every allegation in petitioner's application contained except as may be hereinafter specifically admitted, modified or explained.

2. Respondent admits petitioner's custody but denies that same is in any manner illegal or unlawful.

3. Further answering, respondent states that petitioner is detained by this respondent as Warden of the United States Penitentiary, Leavenworth, Kansas, under and by virtue of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated 10 January, 1946.

4. Further answering, respondent states that filed herewith, attached hereto, and made a part hereof as though fully rewritten herein, are the following exhibits showing authority for the respondent's detention of the prisoner:

Exhibit A—Photostatic copy of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated 10 January, 1946, establishing that on July 1, 1945, the petitioner, having been found guilty for violation of the Ninety-Second Article of War, was sentenced to be dishonorably discharged of the Service, to forfeit all pay or allowances due or to become due, to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life, which sentence was subsequently approved by the reviewing authority, but the period of confinement was reduced to twenty years, the United States Penitentiary, Lewisburg, Pennsylvania, being designated as the place of confinement.

Exhibit B—Transfer of authority whereby the place of confinement is by the Secretary of War transferred from the United States Penitentiary, Lewisburg, Pennsylvania, to the United States Penitentiary, Leavenworth, Kansas.

8 5. Further answering, respondent states that said exhibits, together with the statements and admissions of the petitioner in his application, all show conclusively that the writ of habeas corpus prayed for in this cause should be denied.

Wherefore, having fully answered, respondent prays that petitioner's application for writ of habeas corpus filed herein be denied and that said cause be dismissed.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Respondent.

Filed September 28, 1946.

Opinion.

12 Richard T. Brewster, Esq., of Kansas City, Missouri, and N. E. Snyder, Esq., of Kansas City, Kansas, for the petitioner. Randolph Carpenter, Esq., United States Attorney, Eugene W. Davis, Esq., Assistant United States Attorney and James W. Wallace, Esq., Assistant United States Attorney (Colonel William J. Hughes, Jr., JAGD, and Colonel Franklin Riter, JAGD, were on the brief) for the respondent.

MELLOTT, District Judge: Petitioner, an inmate of the United States Penitentiary at Leavenworth, Kansas, assails, by a petition for a writ of habeas corpus, the legality of his commitment and detention. Copy of the order of a General Court-Martial[1] under which he is held is attached to his petition and to the response of the Warden. Petitioner alleges that the order is illegal and void for several reasons, the chief one urged being that he had been twice put in jeopardy for the same offense in violation of the

[1] The order is dated 10 January, 1946, and indicates that petitioner had been convicted before a general court-martial which convened at Bad Neuenahr, Germany, on 30 June and 1 July, 1945, pursuant to paragraph 1, Special Orders No. 143, Headquarters Fifteenth United States Army, 23 June, 1945, as amended by Paragraph 1, Special Orders No. 146, Headquarters Fifteenth United States Army, 26 June, 1945, on a charge of having carnal knowledge of a German female, on or about 14 March, 1945, forcibly and feloniously, against her will. Sentenced on July 1, 1945, to be dishonorably discharged, to forfeit all pay and allowances and to be confined at hard labor for the term of his natural life, the sentence was approved by the reviewing authority but the period of confinement was reduced to 20 years. The record of trial having been examined by the Board of Review in the Branch Office of The Judge Advocate General with the United States Forces, European Theater, the Board (three members, Judges Advocate, concurring) submitted its opinion to the Assist-

Fifth Amendment to the Constitution and the Fortieth Article of War.

13 There is no controversy between the parties as to the facts. Each specifically adopts the statement of facts set out in the holding of Board of Review No. 4 of the Branch Office of the Judge Advocate General with the European Theater, introduced in evidence in this proceeding. This Court, therefore, specifically finds the facts to be as shown in such holding, summarizing them for present purpose and showing in foot-notes some portions of the record of trial, deemed to be essential to an understanding of the issue to be determined.

Petitioner, then a Private First Class of Company K, 385th Infantry, and Thomas Cooper, a Private First Class in the same company, were arrainged separately and tried together, with their consent, upon charges of violation of the 92nd Article of War, the specification, in each instance, being that the accused, on or about 14 March, 1945, had forcibly and feloniously had carnal knowledge of a different named German female against her will. Cooper was acquitted and petitioner was convicted. Petitioner was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority should direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years.

When the General Court-Martial, which found petitioner guilty, convened at Bad Neuenahr, Germany, on 30 June, 1945, petitioner interposed a plea in bar on the ground of

---

ant Judge Advocate General in charge of the Branch Office that the record of trial was legally insufficient to support the findings of guilty and sentence. The Assistant Judge Advocate General dissented from the opinion of the Board of Review, monumenting his view in an opinion shown in the record of trial. The opinion of the Board of Review and the dissent of the Assistant Judge Advocate General were submitted to the Commanding General, United States Forces, European Theater, under the third paragraph of Article of War 50½ and upon consideration thereof and of the record of trial the sentence was confirmed 21 December, 1945, by command of Joseph T. McNarney, General, U. S. Army, commanding.

former jeopardy; but, at the suggestion of the Court the plea was reserved until arraignment. Upon arraignment the plea in bar was renewed. Extended argument upon the plea in bar ensued and a duly authenticated rec-
14 ord of a former trial of the accused at Pfalzfeld, Germany, 27 March, 1945, by a General Court-Martial appointed by the Commanding General, 76th Infantry Division, was introduced. There is shown in the margin the initial statement of counsel for the defendant made at that time.[2]

There is set out, at this juncture, a paragraph from the opinion of the Board of Review.

"The record of former trial discloses that Wade was tried before a Court of competent jurisdiction upon the Charge and Specification involved here. He was arraigned and issues were joined by his plea to the general issue (Def. Ex. A, pp. 5. 6); the prosecution introduced evidence and rested (Def. Ex. A, pp. 7-22); and the defense introduced evidence and rested (Def. Ex. A, pp. 22-60).

[2] Major Richard T. Brewster, Cavalry, Headquarters 15th United States Army, who has since resumed the practice of law and now appears as counsel for petitioner, and who was counsel for the defendant, Wade, in the Court-Martial proceeding, said: "I would like to set out what the record shows. The record shows that the case against Private First Class Wade was tried; that after the prosecution and the defense rested, the Court stated it wanted no further evidence, the prosecution stated it had no further evidence, the defense stated it had no further evidence and the Court was closed. After deliberating on the case—and I state that when a Court does deliberate on a case, it certainly places in jeopardy the man whose case is being deliberated on—the Court reopened and requested the calling of certain other witnesses. The case was continued for those witnesses and I maintain that that Court and no other Court has the right to sit in judgment upon the cases against Pfc. Wade. It would be a strange thing if other Courts can sit in judgment on the case, not only would it violate the constitutional rights of Pfc. Wade given to him by the Fifth Amendment against twice being placed in jeopardy for the same offense, not only does it violate the plain language of Article of of War 40 but it violates every sense of justice and the due administration of justice because when you shift cases around, you allow time to lag, you allow witnesses to die in action and to disappear and you allow memory to fail. I say that not only on constitutional and legal grounds but on common sense grounds, this case should be barred as the only Court which has jurisdiction is the Court of the 76th Division of which Pfc. Wade was a member. I ask the Court to consider those grounds."

Both the prosecution and the defense then stated they had nothing further to offer, the Court stated it did not desire any witnesses called or recalled, and, after arguments were made, the case was submitted and the Court was closed (Def. Ex. A, p. 60). The Court was opened later and announced that it desired to hear other named witnesses, and continued the case until a date to be fixed by the Trial Judge Advocate (Def. Ex. A, p. 60). Seven days thereafter, on 3 April, 1945, and prior to further action by the Court, the appointing authority withdrew the charges, and directed that no further proceedings be taken by the Court in connection therewith (Pros. Ex. A). On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impracticable and precluded prompt disposition of the case.

15 (Charge Sheet, 4th Ind.). Thereafter, on 18 April, 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction (Charge Sheet, 5th Ind.). The Commanding General, Fifteenth United States Army, in compliance with this request, assumed court-martial jurisdiction; and on 26 April, 1945, referred the case for trial by general court-martial (Charge Sheet, 1st Ind.)."

The documents referred to in the quoted paragraph are in evidence before this Court. They support the statements made by the Board of Review. This opinion will be more understandable if some of them are referred to in more detail. First, then, reference will be made to the "closing" and "opening" of the court-martial. Following the announcement by counsel that "the defense rests" the prosecution announced that it had nothing further to offer and inquired whether the Court wished to have any witnesses called or recalled. This being answered in the negative arguments were made and

"Neither the prosecution nor the defense have anything further to offer, the Court was closed.

"The Court was opened.

"Law Member: The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T. J. A.

"The Court then, at 1700 o'clock, P. M., 27 March, 1945, adjourned to meet at the call of the president."

The withdrawal of the charge and the direction that no further proceedings be taken by the Court, referred to by the Board of Review in the portion of its opinion or statement of facts set out above, are indicated in a communication from Headquarters, 76th Infantry Division, A. P. O. 76, U. S. Army to the Commanding General, Third U. S. Army, A. P. O. 403, shown in the margin.

16 After receipt of the charges and allied papers by the Third United States Army on or about 3 April, 1945, and on or about 18 April, 1945, it, through the Assist-

---

"1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time.

"2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

"3. The Trial Judge Advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:"

ant Adjutant General for the Commanding General, transmitted the charges and allied papers to the Commanding General, Fifteenth U. S. Army, A. P. O. 408, copy of this communication being shown in the margin.[1]

The Commanding General, Fifteenth United States Army, in compliance with this request, assumed court-martial jurisdiction, and on 26 April, 1945, referred the case for trial by general court-martial. Before doing so, however, communication was addressed to Commanding General, First Army, advising that Wade was claiming prior trial for same offense and asking that certified record of trial, if any, and copy of withdrawing order be transmitted.

Apparently in conformity with the request—in any event following it in the trial record—a brief of the Trial Judge Advocate on the subject of "Double Jeopardy" was filed. The conclusion of the Trial Judge Advocate, as therein expressed, was that "Private Wade has not been tried on a former occasion for the offense for which he is now being put on trial." This was premised upon essentially the same line of reasoning as that adopted by the Assistant Judge Advocate General in his communication to the Commanding General, United States Forces, European

[1] "1. Transmitted herewith are charges and allied papers in the case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, charged with rape of a German woman under Article of War 92. The German civilian against whom the crime was committed and other necessary civilian witnesses are residents of territory now under your jurisdiction.

"2. It is impracticable to try this case by court-martial appointed at this headquarters at this time in view of the tactical situation and fact that the location of the incident and places of residence of necessary civilian witnesses are a considerable distance without the boundaries of this command. Standing Operating Procedure No. 35, Military Justice—Continental Operations, published 16 July, 1944, by Headquarters European Theater of Operations, U. S. Army, provides that when practicable the trial of cases involving the peace and quiet of a civil community will be held in the immediate vicinity of the alleged offenses. In order to accelerate the prompt trial of these offenses, it is requested that you assume court-martial jurisdiction in these cases.

"3. The accused is at present in confinement in the Third U. S. Army Stockade, but will be delivered upon request to such place as you may designate.

For the Commanding General:"

Theater (Main) A. P. O. 757, U. S. Army, advising
17 that he did not concur in the holding of the Board of Review that the record of trial was legally insufficient and recommending a contrary holding. The brief of the respondent, filed in this proceeding, espouses the same view.

The question which evolves and as to which several well-trained and reputable members of the bar divide about equally,* is whether petitioner has been twice put in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution. A preliminary issue is whether this Court has any jurisdiction to determine the question in a habeas corpus proceeding. An incidental, although by no means an inconsequential question, is whether the doctrine of "Imperious Necessity" or "Urgent Necessity," authorized the Commanding General of the 76th Infantry Division, in the exercise of his sound discretion, to stop the first trial, withdraw the charges and refer them to the Commanding General of the Third Army for re-trial without hazarding the accused's claim that he had been placed in jeopardy by the proceedings before the 76th Infantry Division Court.

At the outset it may be said that this Court recognizes the limited scope of its inquiry under a petition for a writ of habeas corpus. As learned counsel for the respondent correctly point out upon brief, this Court is not an appellate tribunal sitting in review of court-martial judgments, and it will not arrogate to itself an examination of the record of trial for the purpose of determining whether errors were committed in the reception or rejection of evidence or whether the finding of guilt was sustained by the evidence. Courts-martial are lawful tribunals, with authority to determine cases over which they have jurisdiction; and their proceedings, when confirmed as provided by law, are not to be lightly overturned. But it must be borne in mind that a court-martial is a "creature of statute, and, as a body or tribunal, it must be convened and constituted

*The views of counsel for the petitioner coincide with those of the three Judges Advocate who constituted the Board of Review while the views of the respondent appear to be supported by at least an equal number of lawyers in the Judge Advocate General's Department.

in entire conformity with the provision of the statute or else it is without jurisdiction."[6] The first inquiry, therefore, must be whether the court-martial which com-
18 committed petitioner had jurisdiction to do so.

Inferentially, counsel for the respondent seem to be of the view that this Court is bound by the determination of the court-martial that it had jurisdiction to try the accused and to issue the commitment in question. This seems to be premised upon the assumption that the court-martial's ruling on the question of "double jeopardy" and non-applicability of the Fifth Amendment was a ruling upon a legal issue arising during the trial and therefore may not be inquired into in a collateral proceeding. While the language of some decisions may tend to support that view, this Court is of the opinion that later pronouncements by the Supreme Court authorize it to determine, in a habeas corpus proceeding, whether the petitioner has been twice put in jeopardy for the same offense; for, if the sentence was "beyond the jurisdiction of the Court because it was against an express provision of the Constitution, which bounds and limits all jurisdiction" (Ex parte Hans Nielsen, 131 U.S. 176, 185), it is invalid.

Before passing upon the issue of "double jeopardy" it is appropriate to consider another important question raised by learned counsel for the respondent upon brief. Stated generally it is that one in the military service of his country may not be allowed the protection of the Fifth Amendment. Specifically, it is contended that the petitioner at bar must seek his rights under, and his case

[6] McClaughry v. Deming, 186 U.S.49. Cf. Carter v. Roberts, 177 U.S. 496; Carter v. McClaughry, 183 U.S. 365; Grafton v. United States, 206 U.S. 333; Reaves v. Ainsworth, 219 U.S. 296; French v. Weeks, 259 U.S. 326; Ex parte Reed, 100 U.S. 13; Collins v. McDonald, 258 U.S. 416. Contra Sanford v. Robbins, 115 F. 2d 435.

[7] See, e. g. Ex parte Bigelow, 113 U.S. 328.

[8] Clawens v. Rives, 104 F. 2d 240; Ex parte Hans Nielsen, 131 U.S. 176; United States v. Bell, 163 U.S. 662.

[9] Cf. Rosborough v. Rossell, 150 F. 2d 809; Johnson v. Zerbst, 304 U.S. 458; Bowen v. Johnston, 306 U.S. 19; and Amerine v. Tines, 131 F. 2d 827.

must "be governed exclusively by, the 'double jeopardy' provision of the Fortieth Article of War." The Fifth Amendment provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb."

The Fortieth Article of War is shown in the margin.[10]
19 Under the latter it seems that the pleas "Autrefois acquit" and "Auterfois convict" may be interposed but not the plea of "former jeopardy." Since neither the plea of autrefois acquit nor auterfois convict could be sustained upon the present record, a holding that the Fifth Amendment is not applicable would require discharge of the writ and denial of the petition. No case cited to, or found by, this Court so holds and it is reluctant to be the pioneer in such a decision.

The argument of counsel proceeds substantially as follows: The Congress has the power to provide for trial and punishment of military and naval offenses and has done so, independent of the civil judicial system provided by the Constitution. The Courts have held that the framers of the Constitution meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth Amendment, i. e., to those who were not involved "in cases arising in the land or naval forces, or in the Militia, when in actual

[10] Title 10 U.S.C.A., Sec 1511. "As to number (article 40). No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

"No authority shall return a record of trial to any court-martial for reconsideration of—

"(a) An acquital; or

"(b) A finding of not guilty of any specification; or

"(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

"(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. (June 4, 1920, c. 227, subchapter 11, Sec. 1, 41 Stat. 795.)

service in time of War or public danger."[11] By analogy, if one in the military forces may be denied the right of trial by jury notwithstanding the Sixth Amendment, he may also be denied the protection of the Fifth Amendment against being twice put in jeopardy for the same offense. While some of the early decisions contained dicta which might be interpreted as construed by respondent, the Supreme Court, in the judgment of this Court, has not specifically so held. On the contrary, in a much later case, also discussed by counsel upon brief,[12] it is pointed out that while Congress, "by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army * * * those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense." This language is characterized by counsel for respondent as obiter dictum, inasmuch as the discussion in which it is contained seems to be broader than the issue under consideration; but while the question now raised is not precisely the same as the one before the Court in the cited case, this Court is constrained to accept the quoted statement as a correct exposition of the principle of law to be applied.

It is of interest to note that the Board of Review took essentially the same view of the question as this Court has indicated it takes. It held that the intendment of the two inhibitions against double jeopardy—i. e., the Fifth Amendment and Article of War No. Forty—was essentially the same, pointing out that the Fifth Amendment "is a limitation on courts-martial, as they, like other Courts deriving from an exercise of the Federal power, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made." The authorities cited[13] support the conclusion reached.

[11] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123.

[12] Grafton v. United States, 206 U.S. 333.

[13] Sanford v. Robbins, 115 F. 2d 435, 438; United States ex rel. Innes v. Hiatt, 141 F. 2d 664; Ex parte Quirin, 317 U.S. 1. Cf. Schita v. King, 133 F. 2d 283; Shapiro v. United States, 69 F. Supp. 205.

Respondent contends that the portion of Article of War Forty reading: "* * * but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case" is definitive of "jeopardy" in all cases triable by courts-martial. This Court is constrained to hold, as did the majority of Board of Review No. 4, that such definition is applicable only to those cases in which the accused has been found guilty, and that the purpose of such provision is to authorize the reviewing or confirming authority to remand a case for a new trial where
21 the finding of guilty is not approved. The context of Article Forty indicates the provision quoted is but a statement of principles protecting the accused rather than an enlargement of the power of the reviewing or confirming authority to a point of conflict with the protection of the double jeopardy clause of the Fifth Amendment. A construction of a statute which does not conflict with the Constitution is to be preferred over one which conflicts with the Constitution.

Has petitioner been twice placed in jeopardy for the same offense within the purview of the Fifth Amendment? "The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information, has pleaded, and a jury has been impaneled and sworn; and where a case is tried to a Court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the Court has begun to hear evidence." McCarthy v. Zerbst, Warden, 85 F. 2d 640, 642. The prohibition against double jeopardy is not directed to the peril of a second punishment, but to a second trial for the same offense. Kepner v. U. S., 195 U.S. 100, 130.

The Board of Review expressed the opinion that the burden of pleading and proving former jeopardy rested upon petitioner and, in the event of his failure so to do, waiver would follow. The record clearly indicates, however, that no waiver occurred, the plea having been properly made and argued at length. That it should have been sustained seems to be clear, tested by the rule referred to

in the preceding paragraph. Whether the refusal of the military authorities to release upon the ground of double jeopardy may be passed upon in a habeas corpus proceeding has already been discussed. Being of the opinion that it may, the Court now holds that petitioner was placed in jeopardy by the court-martial convened by the 76th Infantry Division; that his subsequent trial and conviction by the general court-martial convened by the 15th United States Army at Bad Neuenahr, Germany, placed him in double jeopardy; and that the last-mentionad trial and conviction are void for lack of jurisdiction unless the doctrine of "Imperious Necessity" or "Urgent Necessity," yet to be considered, justifies a different conclusion.

22 It is significant that the view of this Court, which is essentially the same as that expressed by the Board of Review in its opinion, was also shared by the Assistant Judge Advocate General (who dissented from the conclusion of the Board of Review) as expressed in his communication to the Commanding General, United States Forces, European Theater. Therein he said:

"I am in accord with the Board of Review in its analysis of the principles of law applicable to the plea of former jeopardy and subscribe to the doctrine expressed in the opinion that in the trial of cases before general courts-martial, jeopardy within the meaning of the relevant provision of the Fifth Amendment to the Federal Constitution may attach prior to findings by the Court and approval of the sentence by the reviewing authority. I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment and the adjudications of the Federal Courts with respect to the 'double jeopardy' clause therof."

His difference with the Board of Review was stated to "resolve about the question as to the operative effect" and applicability of the principles discussed in the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Cornero v. United States, 48 F. 2d 69.

In Cornero v. United States, supra, a jury had been impaneled to try defendants charged with a conspiracy to violate the National Prohibition Act. The prosecuting at-

torney having announced that he was unable to proceed because of the absence of necessary witnesses, the jury was discharged. The Court held that jeopardy had attached and that the doctrine of imperious necessity did not extend to the absence of witnesses.

The Board of Review, relying upon the statement made in the communication from Headquarters, 76th Infantry Division to the Commanding General of the Third Army (see footnote 3):

"* * * The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. * * *"

applied the rationale of the Cornero case, pointing out that while situations might arise in the administration of military justice, calling for the exercise of the doctrine of imperious necessity, the absence of witnesses
23 alone "does not sanction the exercise of the doctrine." The Assistant Judge Advocate General took the view, however, "that the situation disclosed in the instant case is, in the application of the doctrine to the Military Courts, well within the description of 'urgent circumstances,' notwithstanding the generally accepted limitation of the Civil Courts." He placed substantial reliance upon the sentence in the communication immediately following that set out above (see footnote 3), reading:

"Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

Counsel for respondent, upon brief, urge that the sentence last quoted "is a finding by the Commanding General of the 76th Infantry Division that a military situation existed which required the discontinuance of the trial before the Court appointed by him and the transfer of the cause to a jurisdiction where military conditions permitted the production of the witnesses." This Court does not so construe the language used, especially when

considered, as it should be, in its context. In this connection the record with reference to the closing and reopening of the case, shown elsewhere in this opinion, should likewise be considered.

It would serve no good purpose to discuss at length the doctrine of "imperious" or "urgent" necessity. The Board of Review defines it as "a sudden and overwhelming emergency, uncontrollable and unforseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency." The Board's characterization of the term as

"* * * an illusive and expansive doctrine, not susceptible of precise definition because it is designed to apply to emergent situations * * *."

is approved by the Assistant Judge Advocate General in his communication to the Commanding General as is also its statement to the effect that "the power should be exercised with caution, and * * * be limited to the most urgent circumstances"—"a real emergency which is diligence and care could not have been averted." Cf. United States v. Perez, 9 Wheat. 579. The list of instances in which it is to be applied, given in the opinion of the Board of Review—where a jury is unable to agree; misconduct tainting the panel; inflammatory press releases corrupting the jury; relationship of a juror to the accused; incapacity of a juror, etc.—is illustrative only. Other situations come to mind; and if the record in the case at bar indicated that the "tactical situation" was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine is applicable. As previously pointed out, however, the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it.

24

This Court is of the opinion and now holds that petitioner is illegally detained and restrained of his liberty by the respondent herein. Order releasing him from custody is accordingly being entered. Inasmuch as the order is reviewable (Title 28, U.S.C.A., Sec. 463), a good and

sufficient bond, conditioned according to law, in the amount of Two Thousand Five Hundred ($2,500.00) Dollars, to be approved by the clerk of this Court, is being made a condition precedent to petitioner's release. (Rule 45. Rules of the Supreme Court.)

Filed May 9, 1947.

---

25 [Judgment.]

Good cause appearing therefore and for the reasons set out in an opinion this date entered herein, it is now by the Court found and determined that petitioner is illegally detained and restrained of his liberty by the respondent above named. It is therefore by the Court

Ordered, that petitioner, forthwith and upon the filing with, and approval by, the Clerk of this Court of a good and sufficient bond, conditioned according to law, in the amount of Two Thousand Five Hundred ($2,500.00) Dollars, be released from custody. (Title 28 U.S.C.A. § 463; Rule 45, Rules of the Supreme Court.) It is further

Ordered, that the Certificate of the Clerk of this Court that the bond required has been given is a condition precedent to the release of the petitioner from custody; but failure to give such bond shall not affect the determination heretofore made. The Court specifically reserves jurisdiction to make such further orders in the cause as may be meet and proper.

Dated at Kansas City, this 9th day of May, 1947.

ARTHUR J. MELLOTT, District Judge.

Filed May 9, 1947.

---

26 Respondent's Motion for Reconsideration.

Now comes the Respondent herein and respectfully moves the Court for reconsideration of its decision and opinion heretofore entered in this cause on May 9, 1947, for the following reasons:

1. Respondent does not request reargument of any of the legal issues set forth in the opinion. This motion for reconsideration is addressed solely to that portion of the Court's opinion which reads as follows:

"* * * the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it."

2. Respondent is prepared to prove by reference to the historical facts showing the movement of the Headquarters of the three units involved—the 76th Infantry Division, the Third United States Army and the Fifteenth United States Army—that it was the tactical situations arising out of the concluding six weeks of hostilities in the European Theater of Operations against the armies of the German Reich which were in fact responsible for the action taken here.

3. Respondent is prepared to show the movement of the Headquarters of the 76th Infantry Division from Pfalzfeld, in the Rhineland, a place near the scene of the alleged offense for which petitioner was tried by the 76th Infantry Division Court to Limbach, Saxony, many miles away from the scene of the offense. Respondent is prepared to show how, from March 20 to April 24, 1945, in connection with the pursuit of the German armies the Headquarters of the 76th Infantry Division was at no less than fifteen different places, in four separate provinces of Germany.

27 4. Respondent is likewise prepared to prove the location of the respective Headquarters of the Third and Fifteenth United States Armies during the same period. Such proof will demonstrate that, at the time the charges against petitioner were transferred from the 76th Infantry Division to the Third United States Army, the latter unit's Headquarters were in the vicinity of the scene of the offense; and similarly, that at the time of the second transfer by the Third United States Army to the Fifteenth United States Army, the Headquarters of the last mentioned organization had moved to the vicinity of the place of the offense. Respondent further is prepared to

show that the critical witnesses, for whose testimony the first court-martial trial was adjourned, were finally located at a place which was then under the control of said Fifteenth United States Army.

5. These witnesses would have been produced, not as in the United States pursuant to a subpoena supported by statutory authority (See Article of War 23; U.S.C. 1594) and not as in England by virtue of an Order in Council, but simply as a result of the power of the United States Military Commander, over the inhabitants of conquered territory. Respondent will show, by reference to the progress of the Third United States Army during the last weeks of the war and particularly at the time when the case was transferred from that Army to the Fifteenth United States Army, that the place of residence of the witnesses had passed beyond the control of the 76th Infantry Division and the Third United States Army and was under the control of the Fifteenth United States Army.

6. Respondent believes that this evidence will clearly demonstrate that the term "tactical situation" as used by the Commanding General of the 76th Infantry Division and of the Third United States Army was not a mere form of words designed to disguise a matter of convenience but in truth and in fact accurately described the fluid military situation which marked the closing days of the war in Germany. Consequently Respondent asserts with confidence that the action taken was consistent
28 with the constitutional principles of double jeopardy as applied by Congress to Military Law and the practical necessities of military justice in the provisions of the 40th Article of War.

7. Attached hereto and by this reference incorporated herein is a map showing the respective movements of the 76th Infantry Division, Third United States Army and the Fifteenth United States Army and also indicating the tactical situations which prevailed with respect to said commands during the period when the charges against petitioner were withdrawn from the jurisdiction of the 76th Infantry Division Court and were transferred

to the Court of the Fifteenth United States Army through the channel of the Third United States Army.

8. In its opinion this Court said:

"* * * If the record in the case at bar indicates that the 'tactical situation' was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of imperious necessity] is applicable."

As indicated above, the Respondent is convinced that the proof will show that the tactical situation was, in fact, the motivating reason for withdrawing the charges from the first court-martial.

Wherefore Respondent prays that the Honorable Court reconsider its decision and opinion herein and make and enter its orders fixing the time and place whereat Respondent may submit additional evidence in proof of the facts hereinabove alleged with opportunity afforded Petitioner to submit countervailing evidence if he may desire.

Respectfully submitted,

RANDOLPH CARPENTER,
United States Attorney,
District of Kansas, Topeka, Kansas.

JAMES W. WALLACE,
Assistant U. S. Attorney,
District of Kansas. Topeka, Kansas.

EUGENE W. DAVIS,
Assistant U. S. Attorney,
District of Kansas, Topeka, Kansas.

Attorneys for Respondent.

Of Counsel:
WILLIAM J. HUGHES, JR.,
Colonel, JAGD, U. S. Army.

FRANKLIN RITER,
Colonel, JAGD, U. S. Army.

Filed June 12, 1947.

Note:

Page 30, a large military map showing positions and movements, is not satisfactorily reproducible.

31 Journal Entry of Order on Respondent's Motion to Reconsider.

Now on this 10th day of July, 1947, at Kansas City, Kansas, this proceeding comes regularly on for hearing on respondent's motion for reconsideration of the decision and opinion entered in this proceeding on May 9, 1947.

Petitioner appears by R. T. Brewster and N. E. Snyder, his attorneys of record.

Respondent appears by James W. Wallace, Assistant U. S. Attorney, one of his attorneys of record.

Thereupon, the arguments of counsel are heard and considered; and the Court, having examined the record, and being well and fully advised in the premises, finds that respondent's motion for reconsideration is essentially a motion for a new trial; the motion was not filed within ten days after the final judgment and decision; and the Court is without jurisdiction to entertain the motion. It is therefore

Ordered that respondent's motion for reconsideration be and it hereby is denied.

ARTHUR J. MELLOTT, U. S. District Judge.

O. K.
R. T. BREWSTER,
N. E. SNYDER,
Attorneys for Petitioner.

JAMES W. WALLACE,
Assistant U. S. Attorney
One of Counsel for Respondent.

Filed July 11, 1947.

---

32 Notice of Appeal.

Notice is hereby given that the respondent, Walter A. Hunter, Warden of the United States Penitentiary, Leav-

enworth, Kansas, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the opinion and judgment entered in this cause on May 9, 1947, and the opinion and judgment entered on the motion for reconsideration on July 10, 1947.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Respondent.

Copy of above Notice of Appeal mailed to: Richard T. Brewster, Attorney at Law, 907 Federal Reserve Bank Building, Kansas City, Missouri, and Mr. Nona E. Snyder, Attorney at Law, 210 Brotherhood Building, Kansas City, Kansas, this 25th day of July, 1947.

(Seal.) HARRY M. WASHINGTON, Clerk.

By MARY E. CHAPIN, Deputy Clerk.

Filed July 25, 1947.

---

120 Order Enlarging Time.

And now on this 29th day of August, 1947, comes on for hearing the motion of the respondent for an order enlarging the time in which to file and docket the record on appeal in this the above-captioned and numbered cause. The Court being well and truly advised finds that good cause appears therefor and that said motion should be sustained.

It is therefore ordered that the respondent, Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, be and is hereby allowed thirty days additional time in which to file and docket his record on appeal in this cause.

WALTER A. HUXMAN, Judge.

Filed August 29, 1947.

---

33 Transcript of Proceedings, September 28, 1946.

Hon. Arthur J. Mellott, Judge, Presiding.

Appearances: R. T. Brewster and N. E. Synder, Appeared for Petitioner. Eugene W. Davis and James W. Wallace, Appeared for Respondent.

Be it remembered, on the 28th day of September, A.D. 1946, the above matter coming on for hearing before the Honorable Arthur J. Mellott, Judge of the District Court of the United States for the District of Kansas, and the parties appearing in person and or by counsel, as hereinabove set forth, the following proceedings were had:

34 Mr. Snyder: In this case, if the Court please, the petitioner is ready.

Mr. Wallace: If the Court please, I would like to make some comment.

The Court: We will wait until the prisoner is brought in if he is here. You may proceed, gentlemen. State your appearances for the record.

Mr. Snyder: If the Court please, the appearances on behalf of the petitioner Wade are Mr. R. T. Brewster and N. E. Synder.

The Court: Mr. Brewster I take it is—

Mr. Snyder (Interrupting): Mr. Brewster, if the Court please, is a regularly and duly admitted practicing attorney of the State of Missouri. I do not believe he has been admitted to practice in this Court but I would like, for the purpose of this case, if the Court please, to move you now that he be admitted since he has associated with many resident local counsel.

The Court: He will be permitted to appear in this case.

Mr. Wallace: Appearances for Walter A. Hunter, Warden, respondent in this case are James W. Wallace, Assistant United States District Attorney for the District of Kansas, and Eugene W. Davis, Assistant United States Attorney for the District of Kansas.

---

35 The Court: You may state your case for the petitioner.

Mr. Wallace: If the Court please, there is one comment I think I should make now if you will permit me.

The Court: Very well.

Mr. Wallace: This case, to adequately prepare the defense for this case, it was necessary that there be secured from the Judge Advocate's Division in Washington, through the Attorney General, the proceedings of the court-martial trial and the opinion of the Board of Review. At the time the request was made for such proceedings which as yet have not yet been received by our office, through the courtesy of counsel for the petitioner, our office has been supplied on yesterday, with the copy of the proceedings as furnished the petitioner, and what appears to be the opinion of the Board of Review. Obviously on such short notice we could not present this case as it should be, particularly the brief. I don't want the Court to feel that we, in any way, want to delay the proceedings in this case. I would like though, that on the conclusion of the case, that the respondent have time in which to submit appropriate briefs and the securing of testimony if it appears after the presentation of the petitioner's case, such are necessary.

The Court: We will hear you at the conclusion of the evidence. If such a request is made it will probably be granted.

36 Mr. Snyder: If the Court please, I might state at the outset that we have no disposition to force them unduly into trial. Your Honor knows the record on that—from the record before you the date on which the petition was filed, and as they stated we furnished a copy of the record of trial and a copy of the opinion of the Board of Review No. 4 to Mr. Wallace. Mr. Brewster had tried unsuccessfully until about two days ago to obtain a copy of the opinion of the Board of Review and as soon as he got one he sent one to Mr. Wallace.

Mr. Wallace: That is correct.

Mr. Snyder: This action, if the Court please, is one in habeas corpus to test the validity of the proceedings brought against the petitioner, Wade, by which he is incarcerated now in the Federal Penitentiary at Leavenworth under a general court-martial order No. 2 dated January 10, 1946, which is set out and attached as an Exhibit to the petition and which also is attached as an Exhibit to the response.

Mr. Wallace: Correct.

Mr. Snyder: It shows that he is now incarcerated, serving a sentence, to be dishonorably discharged from the service of the United States Army, to forfeit all pay and allowances due or to become due, and to be confined at hard labor or at such place as the reviewing authority may direct for the term of his natural life.

37 Now, that sentence later was reduced and was finally confirmed is the same except that the sentence is 20 years. He was convicted on the charge of violation of the 92nd Article of War, which is the one relating to rape and it is the charge of committing the crime of rape at Krov, Germany on or about March 14, 1945 against one Rosa Glowsky, a German natural. Now, the principal question for Your Honor's determination here is whether or not the court-martial which made the finding of guilt and which imposed the sentence had jurisdiction to do so. It is the petitioner's contention that that Court lacked sufficient jurisdiction for the reason that he previously had been tried for the identical offense before another court-martial. The evidence will show, if the Court please, that while serving in the Armed Forces in Germany as a member of Company "K" of the 385th Infantry, this petitioner was arrested on March 16, 1945, charged with violation of the 92nd Article of War, the specification being that he did at Krov, Germany, on March 14, forcibly and feloniously and against her will, have carnal knowledge of Rosa Glowsky. On March 27th at Pfalzfeld, Germany, a duly constituted court-martial of the 76th Infantry Division tried this charge and this specification. There was a complete trial. The President of the court-martial asked the prosecution at the termi-

nation of the trial if there was any further evidence to be offered. They stated they had no evidence, no further evidence to offer. The same question was asked of counsel for the defense and a similar response was made.

38 Arguments were then made to the court-martial and at the conclusion of those arguments the President of the Court then announced that the Court was closed, that we will show, if Your Honor please, is tantamount to submission of the case to a jury where it is being tried in one of our Courts here in the United States. No decision or no finding was made upon the specifications or charges but at a later time the Court was reopened and the President announced that additional evidence was desired specifying particularly the parents of the complainant among others, and announced that the case would be continued until a date to be set by the Trial Judge Advocate General and again proceedings were stopped. Thereafter, and on or about April 3, 1945, without the knowledge or consent of this petitioner, or without his having anything to do or say about it or without his counsel knowing or having anything to do or say about it, the charges were withdrawn from that court-martial. The charges were then, after withdrawal from that court-martial and after the breaking up of that particular Court, were then referred to the Third Army for trial. By the Third Army these same identical charges were then referred to the Fifteenth Army for trial and all of this was done without the knowledge or consent of the petitioner.

On June 30, 1945, this particular trial which we state and say was held without jurisdiction of the court-martial, was commenced. The defense counsel at that
39 time was Major Brewster, who is now associate counsel in this case and seated here in the court room. At the conclusion of the case the Court was closed in this second trial and returned a verdict—a finding of guilty of the charge and specification. That is the sentence under which he is now serving.

Now, at the inception of the second trial, if the Court please, defense counsel and I think there will be no ques-

tion about that, before the commencement of the trial raised the question of being twice in jeopardy in violation of the 5th Amendment to the Constitution of the United States. He was told that that plea would be taken at the time for special pleas. He made the reply that he wanted to protest against being twice placed in jeopardy at the earliest inception and before plea and again the same objection and protest was raised at the time the court-martial in the second trial called for any special plea which there might be.

Following this conviction and finding of guilt on the charge and the specification, if the Court please, by the second court-martial, the review provided by the Articles of War was had by the next highest in authority there at the time and place. The result of the first review was a confirmation of the findings of guilt of the charges and specifications but a reduction of the sentence to 20 years. Thereafter, in the regular course of proceedings this finding and conviction came on for review before Board of Review No. 4 in the European Theater. A Board of Review which was composed of three members of the Judge Advocate General's Department. They filed an opinion dated November 7, 1945, in which they held a record of trial legally insufficient to sustain the charges. There was no dissent by any of the three members of the Board of Review but under the system—Army system of court-martials it is permissible for a Branch Judge Advocate General to write a dissenting opinion from a holding of such a Board of Review and the Branch Judge Advocate General did write such an opinion in this case. We have photostatic copies, if the Court please, of that opinion which we obtained only two or three days ago which Major Brewster obtained. They will be offered in evidence.

Under the provisions of the Articles of War when such a dissenting opinion is written, the case then goes for review to the commanding authority of the theater in time of war or, as I understand it, to the President of the United States if not in time of war, is that correct?

Mr. Brewster: Essentially.

Mr. Wallace: That is correct.

Mr. Snyder: The Commanding General of the theater adopted or followed the dissent of the Branch Judge Advocate General, General Joseph T. McNarney was the Commanding General and that is the order, General Court-Martial Order No. 2 under which this petitioner is now being held. I will not go to the trouble of
41 reading the sentence on that was imposed. It is very short. It simply confirmed it, fixed the time of imprisonment at 20 years and ordered him confined at the penitentiary at Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct. Following that, if the Court please, efforts were made to obtain and procure a further review and all of those efforts were unsuccessful.

Major Brewster will—has letters here which I think we will have no difficulty with counsel agreeing that they bear the stamp and letters of the War Department, that there is no further relief available to the man through the Army channels of the Court Martial.

Mr. Wallace: No, we wouldn't agree to that.

Mr. Snyder: We will see what we can agree on—the letters when you get them, then.

Mr. Wallace: All right.

Mr. Snyder: That by—the case has been wonderfully developed, if Your Honor please, in this opinion by the Board of Review No. 4. In that opinion will be found the citations of cases which we believe are those that govern the principles of law applicable in this case. It seems to be conceded in this opinion of the Branch—of the Board of Review No. 4 that first, there is no question that the Fifth Amendment insofar as the former jeopardy clause is concerned, is applicable to court-martial and in the second place it seems to be clearly conceded in that
42 opinion that there has been no waiver of his right not to be twice placed in jeopardy for the same offense and so the issue has become narrowed to the question of whether or not under the doctrine that has been labeled imperious necessity, charges may be withdrawn

from a court-martial after a full and complete trial and referred to another division—district, another division —referred to another Army and from that Army to yet another Army for general court-martial without violating the provisions of the *15th* Amendment prohibiting any person—any citizen of the United States from twice being placed in jeopardy for the same offense. Of course we think the burden is on them to show that.

I do not know how much evidence it will be necessary for us to introduce. I feel confident that the able United States Assistant Attorney will readily agree to whatever documents we have here which are properly identified and set up. I am referring specifically to the record of trial which was furnished to the petitioner Wade under the Army Court-Martial Rules, the original of which we have here, and a copy of which we have furnished to Mr. Wallace, and the opinion of the Board of Review furnished to us by the War Department of the United States.

I believe when we have shown Your Honor that state of facts on the record and these exhibits are offered and identified and admitted, there can be no possible doubt or question in your mind that the petitioner, Wade, is entitled to be discharged from the unlawful confinement which he is now suffering by virtue of the void order attached to the complaint in this case.

43

The Court: Do you desire to state your case at this time on behalf of the respondent?

Mr. Wallace: If the Court please, I would like to say without admitting the contentions just advanced by petitioner's counsel, that his belief that the statement of the facts in this case have been well stated. I am unable to admit that they are entirely correct because of the lack of the authenticated copy of the Board of Appeal. What I have are just what purports to be copies. I would like to say this, that the contentions of the respondent will be that the petitioner was not placed in jeopardy the second time by the second court-martial by virtue of three rea-

sons: The first one which will be subsequently developed, that having raised—once raised the question of double jeopardy at the outset of the second trial and the question having been adjudicated by that Court and passed upon and proceeded with, as far as court-martials are concerned the question cannot again be raised here. Secondly, that through the doctrine of imperious necessity just suggested by Mr. Snyder, that the facts present in this case were such that is the—there was such a state of combat and activity in that locality that the appointing authority had the right to avail himself of that doctrine and withdraw those charges from the first Court and submit them to the second, and thirdly, that Article of War 40, 44 which is the Article of War dealing with the double jeopardy, and the Fifth Amendment, provides that a trial shall not be considered to be complete until such time as the reviewing authority shall have passed upon it and in the instant case while the case had proceeded sufficiently far that the Court had closed, he had not yet processed it to the reviewing authority to whom it must have gone had there been a sentence, and consequently he was appointed the apointing authority to withdraw.

I believe that is all at this time.

The Court: Call your first witness.

Mr. Snyder: If the Court please, we have here—Mr. Wallace, I don't know whether you have seen this or not. I would like to have you examine it. Will you mark this for identification, please, the Petitioner's Exhibit No. 1.

(Document marked Petitioner's Exhibit No. 1.)

Mr. Snyder (Continuing): —which we are offering for identification and will later offer in evidence as the complete record of both trials which was furnished to the petitioner—as they were furnished to him but which are incomplete in that certain exhibits were not attached to them. Mr. Wallace, will you examine—

Mr. Wallace (Interrupting): The respondent has no objection to it being introduced as to the record of trial

which was furnished the petitioner at the conclusion of the court-martial.

45 The Court: It may be received then as Petitioner's Exhibit No. 1.

Mr. Snyder: Mr. Wallace, are you in a position to admit that this is Plaintiff's Exhibit No. 1—the Petitioner's Exhibit No. 1 is a correct record of what transpired insofar as it goes?

Mr. Wallace: No, I cannot admit such for the reason that the petition in itself states that respondent was furnished an incomplete copy.

Mr. Snyder: That is true.

Mr. Wallace: I suppose that was corrected or partially corrected by the receipt of the Board of Opinion but there are letters—a letter withdrawing the case from the first trial and others that are not there and—that are not there contained and for that reason I cannot admit it.

The Court: The document may be handed to the Clerk and may be marked as an Exhibit in this case and received in evidence for whatever it is worth.

---

46 Mr. Snyder: Mr. Wade, will you be sworn?

FREDERICK W. WADE, being first duly sworn, testified as follows:

Direct Examination by Mr. Snyder.

Q. Your name is Frederick Wade?—A. Yes.

Q. Now, speak a little bit louder so the Court can hear you and so the reporter can get it. You are the petitioner in this case?—A. Yes.

Q. And you are the same Wade who was tried in the two Court-Martial proceedings which we have referred to here in this opening statement this morning?—A. Yes.

Q. I will hand to you the Petitioner's Exhibit No. 1 and ask that you examine that.

The Court: It is rather voluminous, the witness can't very well examine it at this time. I don't know just what you are asking about.

Q. (By Mr. Snyder): Can you identify that Exhibit 1, Mr. Wade?—A. Yes.

Q. Have you seen it before?—A. Yes, it was given to me after the trial.

The Court: I can't hear you, young man, just speak right out so we can hear you.

A. I say it was given to me after I was tried.

The Court: Speak right out.

47 Q. (By Mr. Snyder): By whom was it given to you, do you recall?—A. No.

Q. You then gave it to Mr. Brewster?—A. Yes, sir.

Q. So far as it goes, is it a complete and—strike out the word "complete"—is it an accurate record of the proceedings at those trials?—A. Well, I don't know that.

Q. All right. Handing you for your examination the last page of Plaintiff's Exhibit No. 1 I wish you would examine that and then state to the Court whether or not that is a true and correct statement of what happened at the second—at the first trial at the termination of the offering of evidence?—A. You want to know whether all of this took place?

The Court: I don't hear the witness.

Q. (By Mr. Snyder): You will have to speak a little louder, Mr. Wade?—A. This is as it happened, Your Honor.

Mr. Snyder: That last page which we wanted identified, Your Honor, I think there will be no objection, you have a copy of it there—simply shows that at the conclusion of the trial both the prosecution and the defense rested—stated they had no further evidence, and the Court was closed and then that the Court again stated they desired further evidence and would continue it until a later date set by the Trial Judge Advocate General. You have seen that, you have a copy of it.

(Colloquy here had between counsel, off the record.)

48 Mr. Snyder: The Petitioner's Exhibit No. 1 is offered not as a complete copy in response to your question, Mr. Wallace, but as a copy of the record of the trial, of both trials which this petitioner received as required to be furnished to him by the Articles of War when he requested it, and he did so request.

Mr. Wallace: And it is submitted that it is incomplete in some respects?

Mr. Snyder: That record is incomplete.

Mr. Wallace: There is no objection to it being admitted as the copy furnished the petitioner at the conclusion of the trial, if Your Honor please.

Q. (By Mr. Snyder): Mr. Wade, were you ever advised that your case was being withdrawn from the 76th Division Court-Martial? Did anyone ever tell you that your case was going to be withdrawn or that it was withdrawn from the 76th Division Court-Martial?—A. No.

Q. Did anyone ever tell you that it would have been—that it had been referred to the Third Army Court-Martial?—A. Not until I was charged in the Fifteenth Army.

Q. All right. That was at the time of the second trial then, when you first learned that, is that correct?—A. Yes.

Q. All right. Will you state to the Court whether or not you consented to the second trial?—A. I did not consent.

Mr. Snyder: That is all. You may cross examine, Mr. Wallace.

49 Cross Examination by Mr. Wallace.

Q. Mr. Wade, when were you inducted into the Army?—A. In June, 1943.

Q. When were you discharged from the Army?

Mr. Snyder: That is objected to as wholly immaterial, Your Honor. He has never been.

The Court: The record shows that he—that there has been some proceedings under which he was given a dishonorable discharge. I don't suppose any document has

been delivered to him excepting the Court order, is that correct?

Mr. Wallace: All I want to get is a statement that he was not discharged prior to the court-martial.

The Court: You may ask that question. Do you understand the question?—A. Yes, Your Honor.

The Court: You were not discharged other than as shown by these Court records, is that right?—A. Yes, that's right.

Mr. Wallace: I think that is all.

Mr. Snyder: You may stand down, Mr. Wade.

Respondent's Exhibit B.

Headquarters Fifteenth US Army
Office of the Army Judge Advocate
APO 408

21 July 1945

B-32 United States vs. Private First Class Frederick W. Wade (white), 39 208 980, and Private Thomas Cooper (white), 35 766 893, both Company K, 385th Infantry.

Present Ages: Wade: 28 11 12 years. Cooper: 31 4 12 years.

Dates of Enlistment: Wade: 21 June 1943. Cooper: May 1941.

Prior Service: As to each: None.

Date of Confinement: As to each: 18 March 1945.

Tried at: Bad Neuenahr, Germany.

Date of Trial: 30 June 1945.

Sentence: As to Wade: DD, TF, and CHL for life. As to Cooper: Acquitted.

(Maximum Authorized: Death.)

Prior Convictions: As to Wade: SCM, 20 Apr 44, AW 61 and 65, failure to repair and willfully disobeying NCO, disrespectful manner toward NCO; Sum CM, 15 Mar 44, AW 61, AWOL. As to Cooper: None.

Charges: As to Wade: Charge: AW 92. Pleas: Not guilty. Findings: Guilty. Spec: Rape. Pleas: Not guilty. Findings: Guilty.

Charges: As to Cooper: Charge: AW 92. Pleas: Not guilty. Findings: Not guilty. Spec: Rape. Pleas. Not guilty. Findings: Not guilty.

1. Evidence.

Accused Wade was charged with the rape of Rosa Glowsky, and accused Cooper was charged with the rape of

Mathilde Klein, violations of AW 92, both offenses occurring at Krov, Germany, on 14 March 1945 (R 5, 6). By direction of the appointing authority (R 2), a common trial was ordered, to which both accused consented in open court (R 3). One of the assistant defense counsels was absent, but both accused agreed to his absence (R 3). The Court was properly qualified as to conscientious scruples against the imposition of the death penalty (R 4). The Trial Judge Advocate correctly and timely called the Court's attention to the fact that the President of the Court would assume the duties of the absent Law Member in accordance with Article of War 31 and Paragraph 51, Manual for Courts-Martial, 1928 (R 5). Cooper had no special pleas and plead not guilty to the specification and charge (R 6). Wade interposed a special plea in bar of trial, based upon claimed former jeopardy (R 7), which plea was argued at length (R 7-12). The Court closed, deliberated upon the plea for ten minutes, and then denied it (R 12), following which Wade plead not guilty to the specification and charge (R 12). After the prosecution rested its case, Cooper interposed a motion for a finding of not guilty, which was denied (R 63). The President of the Court fully and properly explained to both accused their rights as a witness (R 163, 164), and each elected to testify under oath (R 164, 182). Following the close of its case, the Defense renewed Cooper's motion for a finding of not guilty; again it was denied (R 196). Cooper was found not guilty of the specification and charge (R 196) and was acquitted (R 197), but Wade was found guilty of the specification and charge (R 196) and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life (R 197).

It was established that each of the accused were in the military service of the United States on the date of the alleged offenses and at the time of trial (R 61, 62).

Due to the close relationship of the evidence relating to both accused, a separate discussion thereof is not deemed necessary; however, pertinent testimony as to certain major points of contention, such as time, identification of both accused, alibi, etc., will be summarized under separate sub-headings.

a. For the Prosecution.

American troops entered Krov, Germany, about 5:00 P.M., Tuesday, 13 March 1945 (R 21, 55). The next evening, shortly before 6 o'clock, two American soldiers were observed by several German civilians entering the Dietrich house, located across the street from the house owned by Matthias Weiskopf (R 31, 55); then, the same two soldiers entered the adjoining home of Anni Endt (R 13, 43). It was getting dark as they entered Mrs. Endt's kitchen through the back door (R 43). They stayed for ten or fifteen minutes (R 44), during which time Mrs. Endt was able to closely observe and remember the larger soldier, but could not remember or recognize the second soldier (R 44, 47).

Upon leaving Mrs. Endt's house, the two soldiers crossed the street and entered the Weiskopf house through the unlocked front door (R 13, 31, 49, 55). At this time, Rosa Glowsky, (age 24, married), one of the daughters of Matthias Weiskopf, was standing in Widow Jacoby's barn, on the same side of the street and just a short distance from the Weiskopf home. She observed the soldiers entering her home (R 13). Her father and sister, Mathilde Klein, (age 29, married), were in their kitchen, in the front part of the house (R 32, 56), while Regina Weiskopf, a daughter-in-law of Matthias Weiskopf, together with her children, were in their own kitchen, which adjoined that of her father-in-law (R. 49). After entering the house, the two soldiers came into the front kitchen (R 56), and the smaller, heavier-set soldier approached Mathilde, who was standing at the stove fixing supper (R 32, 56). He tapped her on the shoulder and indicated that she should go upstairs with him (R 32, 56, 57), while the larger soldier remained in the kitchen with her father and seated himself right next to the door (R 34, 57). At this time, it was still daylight (R 14, 32, 56).

Mathilde and the smaller soldier went to the rear kitchen, where he asked Regina to go out of the room (R 49), which she did, and accompanied by her children, went into the front kitchen (R 50). Then, Mathilde and the same smaller soldier went through all of the rooms upstairs, some store-rooms, other parts of the house, the

barn, and returned to the kitchen, where Mathilde asked her father for the key to the basement into which her male companion had indicated to her that he wanted to go (R 33, 34). Mathilde asked her father to come along, but the larger soldier, speaking in understandable German, said, "Alone" (R 33). Mathilde and the smaller soldier went to the basement, observed by Rosa, who, at this time, was still outside (R 14, 33). Upon arriving in the basement, the smaller soldier flashed his light around and then forced Mathilde into a corner upon a large, wine barrel (R 34). He removed her drawers (R 35) and proceeded to have sexual intercourse with her. At first, she resisted, fighting him off with her hands and feet; but she was nervous (R 34), excited, and afraid he would shoot her. He penetrated her private parts with his private parts (R 35). She did not consent to the act and moaned during its commission (R 35), which lasted about fifteen minutes. Mathilde tore herself loose and ran to the door of the basement, but the smaller soldier caught her and held her fast, attempting to engage her in conversation (R 36). After some fifteen or twenty minutes, Mathilde ran into the yard upstairs, followed by the smaller soldier (R 36).

Meanwhile, Rosa, some twenty minutes after first seeing the two soldiers enter her home, went into the front kitchen, joining her parents, Regina and her children, and the larger soldier, who, at that particular time, was standing at the kitchen cupboard (R 14). He laughed at her a little, and she sat down on a sofa in the corner, facing the larger soldier, who resumed his seat near the door (R 15). Then, this larger soldier told her to wait in the kitchen, while he went out, returned, went out a second time, and upon returning, motioned to her to come along with him, saying, in German, "Come along, lady" (R 15). He was armed with a pistol, carried in a holster (R 15). Rosa told her father to come along, but the larger soldier prevented this (R 16). She followed him, wholly afraid (because "everything was so new . . . I thought if he told me to come along, I had to come along" (R. 16)), to Regina's kitchen, where she asked the larger soldier that she permitted to go to the basement to get her child (R 16).

Instead, the larger soldier drew his pistol and "shut her up." He ordered her to lie down, with which she complied, afraid that he would shoot her (R 16). He pulled her drawers down, opened his pants, laid upon her, and held his pistol at her neck (R 17). At first, she fought him off with her arms (R 17); but she was unable to resist further. The larger soldier penetrated her private parts with his private parts, wholly without her consent or co-operation (R 18). This incident lasted about five minutes, following which she pulled up her drawers and went into the front kitchen, with the larger soldier following her (R 18, 36). At this time, Mathilde and the smaller soldier had not returned, so the larger soldier went to the house door, where he met Mathilde and the smaller soldier (R 19). The larger soldier took out a book and showed Mathilde something in it, though she didn't fully understand. She assumed that he wanted to know her age, so she pointed at a 30 (R 36). The larger soldier then returned to the front kitchen with Mathilde, pointed to the clock, and said, in German "Another hour" (R 36, 51, 58). This was shortly before 7:00 P.M. (R 37). Both soldiers then left, taking with them the key to the house (R 23, 58).

Thereafter, the entire Weiskopf family went into a neighbor's air-raid shelter and barricaded the door (R 23, 58). Both Rosa and Mathilde were crying, with the latter more visibly affected (R 37, 58). Mathilde went to the Pommer's house, excited (R 37). About 9:00 P.M. that same evening, Rosa saw another American soldier, who was billeted next door, and she told him what had happened (R 23).

On the following Sunday (18th) morning, a group of 10 to 15 American soldiers were brought to the Weiskopf home to participate in an identification ceremony. Both Wade and Cooper were among this group of men (R 62, Prosecution's Exhibit "B"). When Mathilde was told that American soldiers were being brought into the house, she had a nervous breakdown, but treatment by an American physician made her feel better (R 38). While she remained in bed, the soldiers were marched into her room, where there was an American soldier and a Polish woman

acting as interpreters, plus the American officer who was conducting the ceremony (R 39). Mathilde was asked to pick out the man who attacked her. The officer moved down the row of men, pointing his finger at each man individually, while Mathilde would nod her head in approval or disapproval. Soldiers not identified left the room (R 39). She picked out a black-haired man, who was not wearing a hat, but who was wearing a scarf and was clean shaven (R 40, 42). After the ceremony was over, Mathilde was satisfied (R 40). She testified that she did not hesitate or delay in her selection of the soldiers lined up in front of her, and that she did not select Wade, whom she had previously identified in Court (R 33). A short while later, Rosa, standing at the window of Mathilde's room, looked out and immediately spotted Wade standing in the outer yard, a few meters distant, with the group of soldiers (R 21, 25, 30). Rosa was not in Mathilde's room at the time of the formal identification ceremony there (R 26, 29). Rosa went downstairs to the front doorway and promptly selected Wade out of the entire group of soldiers as the soldier who had attacked her (R 27). Matthias Weiskopf also selected Wade out of the outdoor line-up, after Rosa had told him that he "would be able to recognize the soldier too," she having already done so (R 60). Then, Wade and the black-haired soldier whom Mathilde had selected were brought into the Weiskopf home, where statements of testimony were taken (R 27, 60). That same evening, another investigation was held at Kinderbeuren, where Rosa again saw Wade, as did she at the former incomplete trial (R 20).

By stipulation (R 62, Prosecution's Exhibit "B"), it was established that the 3rd and 4th Platoons of Company "K," 385th Infantry, were the only troops billeted in Krov, on 14 March 1945.

Testimony of Prosecution Witnesses as to Time of Alleged Offenses.

Rosa Glowsky was in Widow Jacoby's barn "before 6 o'clock . . . It could have been a quarter to 6 - ten minutes to 6" (R 13). She remained in the barn about twenty

minutes (R 13) and went into the front kitchen, at which time it was "absolute daylight" (R 14). The criminal attack by the larger soldier took "About five minutes. Maybe a little bit more than that" (R 18). After the attack, the soldiers did not remain long (R 19). From the time the two soldiers entered until they left, "Altogether, it could have been around an hour. . . . It was around an hour. They came shortly before 6 o'clock and it could have been close to 7 o'clock when they left . . . I still remember well because he pointed to the clock . . . It was around 7 o'clock . . . I don't know whether it was exactly 7 o'clock or a few minutes to 7" (R 22, 23).

Mathilde Klein saw the two soldiers enter the Dietrich house "around 5:30," and "about five to ten minutes" later saw them enter Mrs. Endt's house (R 31). The criminal attack by the smaller soldier upon her in the basement lasted "15 minutes; it could have been more. I can't say that exactly" (R 36), and the smaller soldier detained her at the basement door, following the attack "15 to 20 minutes" (R 36). When the larger soldier pointed to the clock, "it was about 5 minutes to 7" (R 37).

Anni Endt testified that the two American soldiers came to her house "Between 5:30 and 6 o'clock" at which time "It was getting dark" (R 43), and they stayed in her house "10 to 15 minutes" before leaving (R 44).

Regina Weiskopf first saw the two American soldiers "In my kitchen . . . On the 14th of March before 6 o'clock in the evening" (R 49). They stayed in the house "from about 6 o'clock until a quarter of 7," which she definitely remembered because the larger soldier, "When he was first at the kitchen, he was saying it is nearly 6 o'clock, and at that time, I saw that it was nearly 6 o'clock," and afterwards, when the same soldier pointed to the clock, "It was a quarter of 7" (R 51).

Matthias Weiskopf wasn't too certain as to time because "I never thought I'd have to go to court about it and I never looked at the clock" (R 57). He estimated that two American soldiers entered the Dietrich house "after 5 o'clock" (R 56), that "it was still daylight" when

they entered his kitchen (R 56), and that they stayed in the house "at least three-quarters of an hour" (R 58).

Testimony of Prosecution Witnesses as to Identification of Accused.

Rosa Glowsky identified Wade at the trial as the American soldier who attacked her (R 19). When at her house on 14 March 1945, she described him as "very tall, had a reddish mustache and was wearing a steel helmet which was covered by a net" (R 14). He carried a pistol in a holster (R 15). He spoke German that "was well understandable" (R 15). She did not notice anything about his hair, wound or scratches or scars on his face, or his teeth, because "I was afraid to look at him. I was afraid to look at him closely because he always looked at me"; yet, she added, "I recognize him also by his look out of his eyes. He had such a funny look. Especially today, I recognize him again because he has a mustache again. He looks the same way" (R 24). He had thick lips (R 29). Though he was clean shaven at the identification ceremony on the following Sunday and at the investigation held at Kinderbeuren, she still recognized him immediately (R 20) without needing help (R 29). She also identified him at the former incomplete trial (R 20), at which time, so far as she knew, he didn't have any teeth (R 28). The second soldier who entered her home was a little shorter than Wade, but she never got a good look at him (R 19).

Mathilde Klein identified Wade at the trial (R 33) as the larger of the two soldiers who entered her home on 14 March 1945 (R 36), wearing a field jacket, steel helmet covered with a net (R 32). He wore a mustache (R 36) and spoke some German (R 41). At the former incomplete trial, she testified that he had a good set of upper teeth (R 41), and identified him at the time (Page 21, Defendant Wade's Exhibit "A"). She did not select Wade at the identification ceremony, although he was present (R 40). The soldier who attacked her was the smaller of the two soldiers who entered her home and was heavy set (R 32); black-haired and wore a beard as long as the width of her little finger (R 38, 40, 41). He also wore a

field jacket, red scarf and a helmet (R 40). At the identification ceremony held in her room, she picked out a black-haired man, who was not wearing a hat, but who was wearing a scarf and was clean-shaven (R 40). When confronted with Cooper at the trial, she stated that "This man over here (Cooper) has many similarities" to the man who attacked her, "but I can't say it for certain." He looked "very much like that man" she picked out on the 18th; however, "It could be him but I don't want to accuse anyone without being sure. I just couldn't say that. He looks very much like him." (R 38). At the Kinderbeuren hearing, she could not identify the soldier who attacked her. (R 42).

Anni Endt identified Wade in the Court-room (R 44) as the tall man with a receding forehead, mustache and wearing a net over his helmet (R 46, 47), who entered her home on 14 March. She did not recall anything about his teeth, but she remembered that he carried a white bottle in his hip pocket and had a flashlight (R 46). She particularly remembered him, because "I was very afraid just when I looked at him" (R 45). Prior to taking the witness stand, she immediately recognized Wade outside during a recess (R 47). The second soldier entering her home was of average figure and wore a red scarf under his jacket (R 44); however, she could not identify Cooper at the trial (R 44). She was not present at the identification ceremony, Kinderbeuren hearing or former incomplete trial.

Regina Weiskopf identified Wade at the trial (R 50) as the larger of the two soldiers she saw in the Weiskopf home on 14 March. He was very tall, with reddish hair, mustache (R 49) and beard (R 52). He spoke German (R 50), and she was "certain" that he had upper teeth, because she observed them when he was "always laughing" (R 53, 54). She also identified Wade at the subsequent investigation though he was clean-shaven (R 52). The smaller soldier who was with Mathilde (R 49) wore a red cloth but she couldn't be sure of recognizing him again (R 50). She did not identify Cooper at the trial.

Matthias Weiskopf identified Wade at the trial (R 58), and described him as being the large soldier with a pointed

face that was not clean-shaven. He had a revolver and a holster (R 57). He identified Wade, though clean shaven, following the positive identification made by Rosa, on the morning of the 18th, but he had had ample time to observe Wade following the immediate selection by Rosa (R 60). The second soldier, who took Mathilde, was small, with a round face that was not clean-shaven (R 56). He did not identify Cooper at the trial.

b. For the defense.

The 3rd and 4th Platoons, Company "K," 385th Infantry, entered Krov, Germany, against no enemy opposition, about 5:00 P.M., on 13 March 1945 (R 66, 75, 88, 96, 109, 127, 142, 147, 154, 165, 183) and stayed there about five days. (R 76, 101). An undetermined number of French, Italian and Polish prisoners of war were liberated (R 76 88, 148, 154), none of whom wore helmets (R 81, 90), though some did wear American uniforms (R 143, 148).

The squads took billets the first night in the upper end of the town (R 76, 127), but moved their billets the next morning toward the center of the town (R 67, 77, 127, 143, 148, 167, 183). The 3rd squad, of which Wade was a member, was located about 100 yards below the 1st squad, of which Cooper was a member (R 66, 89, 166). The Weiskopf home was about four or five blocks away—a good ten or fifteen minute walk (R 104, 138, 176). The enemy, across the river, "threw in" some mortars and shells, so observers were sent out (R 115, 169, 186), including Wade, who went out in the morning and returned for the noon meal, after having made several trips in the interim. (R 185, 186). That afternoon, Wade visited Cooper at the latter's billets, and the two of them observed the enemy through binoculars between 1:00 and 1:30 P.M. (R 171, 186).

The 1st squad established a billet guard, composed of two sentinels, one of whom was supposed to stand at the door of the billet, while the other was supposed to patrol 100 yards each way in front of the billet, ready to alert the squad in the event of an enemy counter-attack (R 78,

169). Sentinels, serving tours of two hours on duty and six hours off duty were chosen from a guard roster (R 83, 94, 170). Cooper and Sergeant Levario were on guard duty from 10:00 A.M. to 12:00 noon, and from 6:00 until 8:00 P.M. on Wednesday, 14 March 1945 (R 67, 168). For the evening tour, they were posted at approximately 6 o'clock by Sergeant Rogers (R 67, 78, 168) and were relieved by Sommers and Shaffer at about 8 o'clock (R 68, 77, 170), after which Cooper and Sergeant Levario, accompanied by Sergeant Rogers went upstairs to Cooper's quarters and had coffee and something to eat (R 67, 170). While "pulling this guard" tour, it was just turning dark (R 74). Cooper stood right beside Sergeant Levario during the entire tour that evening (R 67, 169).

Wade arose about 6:00 A.M. on the morning of the 14th and went on guard until 8:00 A.M., after which he ate (R 189). He was seen at morning chow by Sergeant Mattson (R 97), Pfc Lambel (R 137), Pfc Zarilla (R 128) and Pfc Metzger (R 155). Along with the rest of the squad, he moved to new billets (R 183), ate, shaved wth Metzger (R 115, 157) and washed (R 184). When finished, he went downstairs, where Sergeant Mattson asked him if he'd care to observe the enemy aeross the river, to which Wade agreed (R 185). Sergeant Mattson fixed this time as about 11:00 A.M. (R 102), and Pfc Metzger testified that he was with Wade until about 11 or 12 o'clock that morning, though the latter did not recall Wade's going on this patrol (R 158). Wade went to the river side of town, in an alley, and observed the enemy across the river, returning several times to the squad's billet, and upon the completion of his mission, returned for the noon meal (R 186), where he was seen by Sergeant Mattson (R 97) and Pfc Metzger (R 158). After eating, Wade went up to see Cooper, visiting him between 12:30 and 2:00 P.M., observing the enemy through Cooper's binoculars (R 186). Cooper fixed this time as between 1:00 and 1:30 P.M. (R 178). Wade then returned to his billets and stayed around the dining room until about 3:00 or 3:30 P.M. (R 186), during which Pfc Zarilla saw him, remembering the time as 3:30 because a "church rang at that time" (R 132). Pfc Fessenden also saw him at this time (R

113). Wade went upstairs and went to sleep, not awakening until sometime around 6:00 P.M., finding Pfc Boley and Pfc Fessenden in his room (R 186). Pfc Boley fixed the time of his arrival in Wade's room as a "little after 6:00 P.M." and Wade was asleep at this time (R 149). Pfc Fessenden was also sleeping in the same room, and testified that he was awakened at 6:15 P.M., at which time Wade was awake (R 110). The three had a drink of wine (R 110, 186), after which Pfc Boley and Pfc Fessenden went downstairs, followed ten minutes later by Wade (R 110, 186). They talked downstairs for a while, until around 6:30, when Pfc Boley and Pfc Fessenden went to get some eggs, and returned between 7:00 and 7:15 P.M., finding Wade still downstairs (R 110). Wade testified that he waited in the dining room until the evening meal was served, sometime between 7:00 and 7:30 (R 186). He was seen during that time by Sergeant Mattson (between 7:00 and 7:45 (R 106)), Pfc Lambel (between 7:15 and 7:30 (R 137)), Pfc Metzger (about 7:00 P.M. (R 155)), and Sergeant Jones (R 143). About a quarter to eight that same evening, Wade went to Cooper's billet to look for the latter but could not find him. He spoke to one of Cooper's room-mates, who did not know where he was, so Wade returned to his billets (R 187), and went on guard at a late hour (R 188).

Wade wore false teeth (R 129). Shortly before entering Krov, he had broken his upper plate into two pieces (R 98, 110, 118, 144, 155, 172, 184) while cleaning them in the palm of his hand (R 144, 185). He did not get them fixed or wear them until after 6 June 1945 (R 124, 185), as a result of which he could not eat tough meat (R 98).

Some of the men in "K" Company wore silk scarves (R 74, 91). Though prohibited (R 91), Pfc Sklader always wore them (R 74, 79, 136, 142), usually bright-colored ones (R 79, 91, 112), as did Loe and Kefer (R 130, 142). Sergeant Mattson testified that Cooper had worn both G.I. and colored scarves (R 106), but he didn't remember when, nor was he certain that Cooper had one in Krov (R 100). Other defense witnesses stated that neither Wade nor Cooper wore scarves (R 74, 79, 112, 130,

137, 149, 173). Cooper testified that he never wore a scarf (R 173).

All of the men owned captured pistols, including Cooper (R 86), who admitted having one in his billets on the 14th (R 181), and another defense witness recalled that Cooper had carried a pistol in a German holster strapped to his belt (R 134). Wade stated that he did not have a pistol at Krov, but did possess one priorto that time when working in supply (R 187), which fact was corroborated by Sergeant Mattson (R 104).

Wade knew a few words of German, as did most men in the squad (R 136-137).

Cooper was present at the former incomplete trial of Wade, but did not participate therein; rather, he was outside of the court-room, awaiting trial himself (R 175).

Testimony of Defense Witnesses as to Identification Ceremony

Though the many defense witnesses gave slightly varying versions, it appears that the following occurred:

On Sunday morning, about two squads of American soldiers were taken to the Weiskopf home. They went upstairs to Mathilde's room, where she was in bed, nervous, excited and crying (R 99, 136, 150, 156, 188). One of the soldiers and a Polish woman acted as interpreters (R 98, 112, 135), while Captain Chambers, who was in charge, instructed Mathilde to "pick out the two soldiers that entered your home" (R 139, 179). Captain Chambers moved down the row of men (all of whom were wearing helmets (R 140)) standing before Mathilde and placed his hand on the shoulder or pointed to each man individually, after which Mathilde would nod her head. If she failed to identify a soldier, he left the room (R 98, 112, 129, 135, 142, 150, 156, 173, 187). During this process, Mathilde hesitated on Pfc Zarilla, Sergeant Mattson and Cooper (R 98, 112, 129, 135, 142, 151, 156, 178, 188), but they were permitted to leave the room when she failed to make positive identification; however, though she first indicated negatively as to Wade, she changed her mind,

so Wade, who was already leaving the room, was brought back and detained to the end (R 98, 100, 188). Cooper did not wear a scarf at this identification ceremony (R 173).

Thereafter the soldiers were taken downstairs and lined up outside of the front door. Rosa appeared in the doorway and without hesitation, immediately pointed to Wade (R 98, 113, 129, 136, 151, 173, 188), who was the tallest man in the group (R 123, 152). Several of the soldiers remarked "We thought it awful fast" (R 114.) Cooper was not pointed out by Rosa (R 174).

Neither Rosa or Mathilde were able to identify Cooper at the Kinderbeuren hearing (R 161).

Testimony of Defense Witnesses as to Beards Worn by Both Accused.

Cooper usually wore a beard, generally described as a blondish-red goatee (R 68, 78, 88, 93). A few days (variously estimated as two, three and four) before entering Krov, Sergeant Graves shaved off Cooper's long beard in exchange for a haircut given by Cooper to him (R 78, 90, 93, 172). The latter did not have much of a beard upon entering Krov (R 89), due, no doubt, to the fact that his beard was slow-growing (R 172); in fact, it was hardly noticeable (R 91), and Sergeant Levario, who spent some two hours talking to Cooper while on guard the evening of the 14th, testified that Cooper had no beard at all (R 68); however, Cooper testified that on that date he had one and one-half day's growth of beard (R 172).

Wade customarily wore a mustache and beard (R 78, 113, 128, 144, 152, 184). He testified that on the morning of the 14th, he shaved off a heavy beard and mustache (R 184), because of a fresh sore on his lip (R 184). That afternoon, about 3:00 or 3:30 in the afternoon, Pfc Zarilla commented on his lack of mustache (R 188), though no comment, which was usual in such cases (R 81, 114) was made either at noon or evening chow (R 191).

Sergeant Mattson stated that everyone shaved at Krov, shortly after moving their billets and before dinner on the

14th (R 97). He wasn't certain if Wade was clean shaven when he went on patrol (R 102), but he was positive that Wade was clean shaven at dinner (R 97, 108) and at the evening meal (R 102). Wade had a fresh sore on his lip that day (R 100).

Pfc Fessenden did not recall any comment at the noon meal of the 14th about Wade's mustache being missing (R 114, 117) and was fairly certain that Wade was not clean shaven from 9:00 until 12:00 that morning (R 116); however, he did recall that Wade's mustache was missing about 3:00 o'clock that same afternoon (R 113), because Pfc Zarilla commented on it (R 113, 117). He was positive that Wade's beard and mustache were missing at 6:00 P.M. that evening (R 110) and that Wade had a sore on his upper lip (R 114).

Lt. Oakley (by stipulation) stated that Wade shaved off his mustache soon after occupying Krov, and did so in the morning or early afternoon of the 14th (R 65, Defendant Wade's Exhibit "C").

Cooper testified that when he saw Wade between 1:00 and 1:30 P.M. on the 14th, the latter had no mustache (R 171, 178).

Pfc Zarilla recalled that Wade had his mustache when moving the billets on the morning of the 14th (R 128), but had removed it that afternoon by 3:30, because he (Zarilla) commented about it (R 128, 131), and Wade told him that his mustache had bothered his sore lip (R 128, 131).

Pfc Metzger testified that he and Wade shaved the morning of the 14th after moving their billets (R 155, 157), and he saw a fresh, raw sore on Wade's lip (R 159). Wade was clean shaven by noon (R 158).

Pfc Boley saw Wade most of the 14th (R 149), but was not sure about the condition of his mustache (R 149, 153); however, on cross-examination, the Trial Judge Advocate brought out that at the former incomplete trial, this witness testified that Wade had no mustache on the 14th (R 153).

Pfc Lambel didn't remember whether Wade was clean shaven on the morning of the 14th when the billets were moved, but recalled that he was clean shaven at the evening meal, because there were remarks made about that fact (R 137). He thought he saw a cut on Wade's mouth (R 138).

Both accused were placed in arrest on 16 March 1945 (R 193) and shaved that day (R 195); they also had shaved prior to the Kinderbeuren hearing (R 163).

2. Comment.

Wade was arraigned for trial of 27 March 1945, before a General Court-Martial appointed by the Commanding General, 76th Infantry Division, upon the same charge and specification as at instant trial. After both sides rested, the Court was closed, then opened, and the Law Member announced that the Court desired futrher witnesses to be called into the case, and that the case would be continued to allow time to secure certain witnesses named by the Court (Page 60, Defendant Wade's Exhibit "A"). The action of the Court was wholly proper. Paragraph 75b, Manual for Courts-Martial, 1928 (1943 Reprint), Page 58, provides:

"The Court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the Court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence." (Underscoring supplied).

Defense Counsel argued that because the Court had deliberated and failed to reach a finding, an automatic acquittal resulted. Just how long the Court actually de-

liberated after both sides had rested is not shown, but some indication thereof may be determined by reference to the entire record of trial of that first incomplete trial. The Court met at 0920 hours (Page 2, Defendant Wade's Exhibit "A"), and after some 31 pages of testimony were received, the Court recessed until 1350 hours (Page 32, Defendant Wade's Exhibit "A"). Upon reconvening, some 27 pages of recorded testimony and unrecorded short closing arguments by prosecution and defense were heard by the Court, which then closed, after which it opened to announce the continuance and adjourned at 1700 hours. Assuming that approximately 10 pages of testimony per hour were recorded (allowing for preliminary procedures at the morning session), it is wholly probable that closing arguments by counsel were completed no earlier than 1645 hours.

Regardless of fifteen minutes or fifteen hours of deliberation by the Court, Article of War 40 is controlling. The Board of Review has held repeatedly that until the reviewing authority or confirming authority has finally acted upon a record, the trial is not completed (Dig OP JAG, 1912-1940, Sec 397 (1); CM ETO 1673 Denny, 1944, reported in Dig Op, BOTJAG, ETOUSA, page 206). There was no such finality of action as to this first incomplete trial of Wade, and his plea in bar of trial was properly overruled. (Winthrop, 1920 Reprint, pp 259-260, 451-452; Par 68, Manual for Courts-Martial, 1928 (1943 Reprint), page 53. Also see Dig Op. JAG, 1912-1940, Sec. 395 (37), page 227.)

The Defense Counsel, in a very able argument (R 7-12), attempted to apply the well known rules of civil law applicable to former jeopardy, and, in a measure, sought to discredit the citation of authorities contained in Winthrop, cited by the Trial Judge Advocate. It is interesting to note that at the time General Winthrop prepared his excellent and oft-cited volume, Article of War 40 (then Article of War 102) merely provided, "No person shall be tried a second time for the same offense" and it wasn't until the new codification of 1920 that the Article was enlarged to include the present, exact definition of a "trial." The foot-

notes to Military Laws of the United States (Annotated), 1939, Eighth Edition, calls attention to the augmented Article as follows: "This Article is almost entirely new." (Underscoring supplied). Yet, Winthrop was cited, in point, as late as II Bull, JAG, Nov 1943, Sec 397 (1), page 424.

Use of the former record of trial (Defendant Wade's Exhibit "A") in this connection was wholly proper (Par 68, Manual for Courts-Martial, 1928 (1943 Reprint), page 53.

The Court was wholly justified in acquitting Cooper. He never was positively identified, either by Mathilde Klein or other prosecution witnesses. His alibi was well-established and fully proven by witnesses who presented a straight-forward, unshakable story. It is believed that the Court would have been justified in sustaining Cooper's motion for finding of not guilty, either when originally made or when renewed at the close of the entire case, but the same result was attained by the ensuing acquittal.

"In rape cases, a reviewing authority will closely scrutinize the testimony upon which the conviction was obtained, and if it appears contradictory on material issues, incredible, unsubstantial, a court will reverse a conviction." (CM ETO 2625 Pridgen 1944, Dig Op ETO, page 442). The case against Wade resolved itself into a single issue—was he the American soldier who raped Rosa Glowsky on 14 March 1945? The record abundantly supports the fact that an American soldier had carnal knowledge of Rosa Glowsky and that act was done by force and without her consent.

"The reviewing authority is permitted to weigh the evidence and it is his duty to do so and to consider all other aspects of the case, in order that justice may be done." (CM ETO 4386 Green et al., 1945, Dig Op ETO, page 202). Here, a close reading of all of the testimony sufficiently supports the conclusion that accused Wade was the perpetrator of the offense against Rosa Glowsky. This conclusion remains despite Wade's positive denial thereof, and his testimony, supported by some

degree, by other witnesses, that he was at his billet at the time of the offense was committed. (CM ETO 3837 Smith, BW 1944, Dig Op ETO, page 444). The soundness of Wade's alibi was a question of fact for the court (Dig Op ETO, Sec 450 (1), page 402). "The weight to be given testimony by defense witnesses tending to establish an alibi for accused is a matter for determination by the Court. Such testimony may properly be rejected as false when considered in connection with other evidence." (Dig Op JAG, 1912-1940, Sec 395 (57), page 237). The testimony concerning the accused Wade's identification was definite. The Court heard the evidence, viewed the witnesses, and found him guilty. There is substantial evidence in the record to sustain the findings of the Court in this respect.

Considerable testimony was received from both prosecution and defense witnesses as to the identifications made of Wade at various times, some of which was not wholly admissible; however, though Wade had been placed in arrest prior to the actual identification of him by Rosa on Sunday morning, the prohibition announced in IV Bull, JAG, Jan 1945, Sec 395 (3), page 4, does not apply, for each prosecution witness who participated in the original identification actually identified Wade at that time; again actually identified him at the trial, and thereafter testified as to facts and circumstances surrounding the entire identification ceremony. "When a witness in his testimony identifies the accused, he may testify that on a prior occasion, he made an extrajudicial identification of the accused, and persons hearing the extrajudicial identification may likewise testify to it" (CM ETO 3837 (1944), reported in IV Bull, JAG, May 1945, Sec 395 (21), page 175, and Dig Op ETO, page 444. Such testimony of prior recognition was properly admissible (Dig Op ETO, Sec 395 (35b); CM ETO Williams, 1945), and it is felt that any subsequent testimony, whether by prosecution witnesses without objection by the defense or by the defense from its own witnesses, was not prejudicial error, particularly so when Wade himself, by his own sworn testimony, corroborated a good part of the testimony first received.

There are no errors or irregularities which adversely affect the substantial rights of the accused. The evidence is sufficient to support the findings and the sentence.

This offense occurred 14 March 1945, and final trial was not held until 30 June 1945, a delay of three and one-half months; however, it is adequately explained in the chronology sheet.

The conscientious Trial Judge Advocate and the equally capable Defense Counsel conducted the trial wholly in accordance with all announced War Department and Theater directives, and the Court jealously guarded the rights of each accused in every instance. Nothing is left to inferences in the record of trial; procedural gaps were not left to be filled only by presumption. Each accused was fully accorded "due process of law."

Wade, 26 years of age, white, was inducted 21 June 1943, at Fort Lewis, Washington. From a personal history accompanying the record, it appears that his legal residence is Parkland, Washington. He is married and has one child. He formerly worked as a warehouseman, loading and storing goods in a large warehouse. He completed seven years of grammar school, but did not graduate; however, he completed two years extension work in an academic course, and attained an AGTC score of "III-109." As far as is known, he has no civilian convictions.

Accused joined the 76th Division on 1 June 1944, and arrived overseas with "K" Company, 385th Infantry, in England, on 4 December 1944. He had more than two months of continuous combat on the Continent, doing such jobs as were assigned to him, including cook, assistant in supply, scout, and rifleman in the line. His efficiency rating as a soldier is "satisfactory," and he was described as "displaying courage and willingness to comply with any orders given him in combat, regardless of the danger to himself." He has two previous convictions (Special Court-Martial for violations of AW 61 and AW 65, and Summary Court-Martial, for violation of AW 61), both of which occurred in the United States while accused was a member of an anti-aircraft organization.

A psychiatric examination of the accused on 10 May 1945 discloses that he was not suffering from any mental abnormality, nor was he a battle fatigue casualty at that time; however, his Company Commander, in preparing the personal history, stated: "On the date the alleged attack took place, Pfc Wade had been in a tactical situation for about 4 days with little opportunity for rest or relaxation; however, it seems correct to assume that he was capable of distinguishing right from wrong throughout the entire period."

Accused is presently confined in the Oise Intermediate Section Guardhouse pending transfer to the Delta Disciplinary Training Center.

3. Recommendations.

Considering that the accused has been actively engaged in combat and his good record with the Division prior to this offense, it is recommended that the sentence be approved but that the period of confinement be reduced to twenty (20) years, and that the execution thereof be withheld pursuant to Article of War 50½. The U. S. Penitentiary, Lewisburg, Pennsylvania, is the proper place of confinement (AW 42, Cir 229, WD, 8 June 1944, Sec II, par 1b (4), 3b; as amended by Cir 25, WD, 22 January 1945, Sec II).

A form of action designed to accomplish this recommendation is submitted herewith.

MILTON J. MEHL,
Captain, MAC,
Asst. Army Judge Advocate.

I concur with the foregoing review which is well considered and thoroughly presented. The case was fully developed and amply proven.

Only one issue is presented in this case: Was Wade the soldier who raped Rosa Glowsky? Four witnesses, all German, positively identified the accused Wade. These same witnesses failed to identify Cooper. How careful these witnesses were in their identification is indicated in

the testimony of Mathilde Klein wherein she testified that Cooper, who was alleged to have raped her on the same occasion that Wade raped Rosa Glowsky " . . . looks very much like that man . . . It could be him but I don't want to accuse anyone without being sure. I just couldn't say that. He looks very much like him (R-38)." If the identification of Wade was purposely spurious, then why did not the witness also implicate Cooper by identifying him?

The German witnesses were simple people, villagers who had no reason to tell aught but the truth. The Court heard their testimony and the testimony concerning alibi and resolved the issue against the accused. The Court heard the testimony, saw the appearance and deportment of the witnesses and rejected the testimony of the accused's witnesses concerning alibi. Although the reviewing authority may properly weigh the evidence in a case (par. 87b, MCM) he should not overturn the findings of the Court unless their findings are based on incredible and unsubstantial evidence. This is not true in the instant case.

I recommend that the sentence, modified as recommended, be approved. Form of action is submitted herewith.

T. K. IRWIN,
Major, JAGD,
Acting Army Judge Advocate.

Restricted. (87).

B-11 Branch Office of the Judge Advocate General with the European Theater. APO 887. 7 Nov. 1945.

Board of Review No. 4, CM ETO 15320. United States v. Private First Class Frederick W. Wade (39208980) and Private Thomas Cooper (35766893), both of Company K, 385th Infantry.

Fifteenth United States Army. Trial by GCM, convened at Bad Neuenahr, Germany, 30 June, 1 July 1945. Sen-

tence: Cooper, acquitted. Wade, dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

Holding by Board of Review No. 4.

Danielson, Meyer and Anderson, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were arraigned separately and tried together with their consent upon the following charges and specifications:

Wade.

Charge: Violation of the 92nd Article of War.

Specification: In that Private First Class Frederick W. Wade, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

Cooper.

Charge: Violation of the 92nd Article of War.

Specification: In that Private Thomas Cooper, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously against her will, have carnal knowledge of Mathilde Klein.

Each accused pleaded not guilty (after Wade's plea in bar, hereinafter discussed, was overruled) and, three-fourths of the members of the Court present at the time the vote was taken concurring, Wade was found guilty of the Charge and Specification preferred against him. Cooper was acquitted. Evidence of two previous convictions was introduced against Wade, one by special court-martial for failure to repair at the fixed time to the properly appointed place of assembly and willful disobedience of and disrespect toward a noncommissioned officer in violation of Articles of War 61 and 65 respectively, and one by summary court for absence without

leave for 28 days in *villation* of Article of War 61. All members of the Court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged *from* the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

The proceedings as to Cooper were published in General Court-Martial Orders No. 54, Headquarters Fifteenth United States Army, APO 408, U. S. Army, 24 July 1945.

3. The prosecution introduced substantial competent evidence tending to show that on or about 14 March 1945, at Krov, Germany, Wade forcibly had carnal knowledge of Rosa Glowsky, as alleged in the Specification, while the defense introduced evidence to negative the issue of guilt. An issuable question of fact was thus tendered for resolution by the Court, and the findings of the Court, being responsive to the evidence before it, are not, under the circumstances presented by the record of trial, subject to reexamination here.

4. When the court convened, Wade interposed a plea in bar on the ground of former jeopardy (R2), but at the suggestion of the Court this plea was properly reserved until arraignment (MCM, 1928, par. 64, p. 50). Upon arraignment his plea in bar was renewed (R7), and in support thereof a duly authenticated record of former trial (at Pfalzfeld, Germany, 27 March 1945) by a general court-martial appointed by the Commanding General, 76th Infantry Division, was introduced (R7; Def. Wade's Ex. A (hereinafter referred to as "Def.Ex.A"); MCM 1928, par. 68, p. 53). The prosecution then introduced a letter from the Commanding General, 76th Infantry Division, to the Trial Judge Advocate of the former Court, withdrawing the Charge and Specification forming the basis for the proceedings appearing in the record of former trial prior

to the findings (R9; Pros.Ex.A). Argument was had upon the plea in bar (R9-12), the Court overruled the plea (R12), and Wade thereupon pleaded to the general issue (R12).

The action of the Court in overruling the plea in bar presents a *perious* question, and one which appears to be a matter of first impression.

The record of former trial discloses that Wade was tried before a court of competent jurisdiction upon the Charge and Specification involved here. He was arraigned and issues were joined by his plea to the general issue (Def. Ex.A, pp.5,6); the prosecution introduced evidence and rested (Def.Ex.A, pp.7-22); and the defense introduced evidence and rested (Def.Ex.A, pp.22-60). Both the prosecution and the defense then stated they had nothing further to offer, the Court stated it did not desire any witnesses called or recalled, and, after arguments were made, the case was submitted and the Court was closed. (Dec. Ex.A, p.60). The Court was opened later and announced that it desired to hear other named witnesses, and continued the case until a date to be fixed by the Trial Judge Advocate (Def. Ex.A, p.60). Seven days thereafter, on 3 April 1945, and prior to further action by the Court, the appointing authority withdrew the charges, and directed that no further proceedings be taken by the Court in connection therewith (Pros. Ex.A). On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impracticable and precluded prompt disposition of the case (Charge Sheet, 4th Ind.). Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction (Charge Sheet, 5th Ind.). The Commanding General, Fifteenth United States Army, in compliance with this re-

quest, assumed court-martial jurisdiction, and on 26 April 1945, referred the case for trial by general court-martial (Charge Sheet, 1st Ind.).

The question for solution is whether Wade, under the facts disclosed by the record, was placed in jeopardy, so as to bar a second trial, when he was arraigned and tried by the general court-martial appointed by the Commanding General, 76th Infantry Division.

5. (a) That no person shall be *trice* placed in jeopardy for the same offense is a maxim of great antiquity which has found expression in the Constitution of the United States and the Articles of War (Winthrop's Military Law and Precedents (Reprint, 1920), p. 259). The Fifth Amendment, in pertinent part, provides that no person shall be subject for the same offense "to be twice put in jeopardy of life or limb," while Article of War 40 in part recites that "No person shall, without his consent, be tried a second time for the same offense." That the intendment of these two inhibitions against double jeopardy is the same, has long been recognized, and the "rulings . . . by the civil Courts will therefore be applicable to similar cases at military law." (Ibid, p. 259). The Fifth Amendment itself, however, is a limitation on courts-martial, as they, like other Courts deriving from an exercise of the Federal powers, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made (CM ETO 2297, Johnson and Loper; Sanford v. Robins, (C.C.A. 5th, 1940), 115 F (2nd) 435; United States v. Hiatt, (C.C.A. 3rd 1944), 141 F. (2nd) 664; cf. Ex parte Quirin, (1942) 317 U.S. 1, 87 L. Ed. 3). Thus in Sanford v. Robbins, supra at p 438, the Court said:

"We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb', is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions."

Although this provision of the Fifth Amendment effects a limitation on the power of courts-martial, it is only a conditional limitation in that the accused may waive what for him is a personal right. The burden rests upon him to plead and prove his former jeopardy, and in the event of a failure of plea or proof waiver follows (Article of War 40; Dig. Op. JAG, 1912-40, sec. 397(4), p.242; Levin v. United States, (C.C.A.9th 1925), 5 F (2nd) 598; Brady v. United States (C.C.A.8th 1928); 24 F (2nd) 399; Caballero v. Hudspeth, (C.C.A.10th 1940), 114 F 92nd) 545; McGinley v. Hudspeth, (C.C.A.10th 1940), 120 F. (92nd) 523). Here, however, Wade pleaded specially at his first opportunity, and offered competent evidence in support thereof, and no waiver of his rights under the Fifth Amendment or Article of War 40 may be presumed.

In determining when an accused has been placed in jeopardy Courts have reached varying answers, but the opinions of the Federal Courts, which are specially ordained to construe the Constitution, are binding as to the meaning of the language in the Fifth Amendment. It is, of course, recognized that the prohibition is not against the peril of second punishment, but against being twice put in jeopardy (Kepner v. United States (1904), 195 U.S. 100, 49 L. Ed. 114); nor is jeopardy limited to a second prosecution after verdict by a fact-finding body. Some expressions may be found in the early text books (cf. Winthrop's Military Law and Precedents (Reprint, 1920), p.260) and cases which purport to limit jeopardy to a second prosecution after verdict or findings but they have never been sanctioned by the Supreme Court. In Kepner v. United States supra, the Court held that jeopardy should not be construed so narrowly and said (195 U.S. at p. 128, 49 L. Ed. at p. 124):

"* * * some of the definitions given by the textbook writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; * * * the weight of authority, as well as decisions of this Court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him * * *"

As determined by the Federal Courts, jeopardy attaches when an accused has been arraigned on a valid charge, has pleaded thereto, and a jury has been impaneled and sworn; and where a case is tried to a Court without a jury, jeopardy begins when he has been validly charged and arraigned, has pleaded and the Court has begun to hear evidence (McCarthy v. Zerbst (C.C.A.10th 1936), 85 F (2nd) 640). And where jeopardy attaches, for however short a time, the trial must proceed and be prosecuted to a legal termination, or the accused will be discharged and cannot thereafter be tried again under the same or a subsequent charge for the same offense (Cornero v. United States (C.C.A.9th 1931), 48 F (2nd) 69; United States v. Kraut (SD,NY, 1932), 2 F Supp. 16; 1 Wharton's Criminal Law (12th Ed.,1932), sec. 395, p. 547).

The power of the Court to terminate the trial because of imperious necessity, without affording an accused the right to plead former jeopardy in a subsequent prosecution for the same offense, has, however, been recognized. But this doctrine of imperious necessity is based on a sudden and uncontrollable emergency, unforeseen by either the prosecution or the Court,—a real emergency which by diligence and care could not have been averted. It has been held applicable to those cases where the jury is unable to agree (Dreyer v. Illinois (1902), 187 U.S. 71, 47 L. Ed. 79; Keerl v. Montana (1909), 213 U.S. 135, 53 L. Ed. 734; United States v. Perez (1824), 9 Wheaton 579, 6 L. Ed. 165; Logan v. United States (1892), 144 U.S. 263, 36 L. Ed. 429); to misconduct tainting the panel (Klose v. United States (C.C.A.8th 1931), 49 F (2nd) 177); where inflammatory press releases may have corrupted the jury (United States v. Montgomery, (S.D.N.Y.1930), 42 F (2nd) 254); when the relationship of a juror to an accused is discovered during trial (United States v. McCunn (S.D.N.Y.1929), 36 F (2nd) 52); where a juror becomes incapacitated during trial (Simmons v. United States (1891), 142 U.S.148, 35 L. Ed. 968); and where a juror is discovered to have been a member of the grand jury which returned the indictment (Thompson v. United States (1894), 155 U.S.271, 39 L. Ed. 146). It is an il-

lusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow (United States v. Giles (W.D. Okla. 1937), 19 F. Supp. 1009; Pratt v. United States, (App. D.C.1939), 102 F. (2nd) 275). All Courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances. The rule was expressed aptly by Story, J., in United States v. Perez, supra, when he said: (9 Wheaton at p. 580, 6 L. Ed. at p. 165).

"* * * the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner."

In compliance with this admonition of the highest court, the power has been charily exercised.

The rule in the Federal Courts, and in most State Courts, is that the absence of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense (Cornero v. United States (C.C.A. 9th 1931), 48 F (2nd) 69; United States v. Watson, 1868), Fed. Cas. No. 16, 651; Annotation 74 A.L.R. 803; cf. Wharton's Criminal Law, (12th Ed., 1932), sec. 395, p.548 et sec). The same rule is, of course, applicable to termination by a nolle prosequi or by a withdrawal of charges (United States v. Kraut (S.D.N.Y.,1932), 2 F Supp. 16; Clawans v. Rives, (App. D.C. 1939), 104 F (2nd) 240).

The question was squarely presented in Cornero v. United States supra, where a plea of former jeopardy was sustained when a jury was impaneled but was discharged when the prosecuting attorney announced he was unable to proceed because of the absence of necessary witnesses. In holding that jeopardy attached and that the doctrine of

imperious necessity did not extend to the absence of witnesses, the Court said: (48 F (2nd), at p. 71 and p. 73).

"While their absence might have justified a continuance of the case * * * the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial Court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. * * * There is nothing in the cases cited by the government that militates against the authority of the cases we have cited, which are to the effect that mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of his right to claim former jeopardy upon a subsequent trial * * *."

The court further said (48 F (2nd) at p. 71):

"We are here dealing * * * with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. * * * no Court has gone to the extent of holding that, after the impanelment of a jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case."

In the instant case Wade was arraigned on a valid charge and specification before a general court-martial duly appointed by the Commanding General of the 76th Infantry Division. Both the prosecution and the defense introduced evidence and rested, and the Court stated it did not desire to have any witnesses called or recalled and closed. Applying the rule announced by the Federal courts in many cases, we have no difficulty in concluding that Wade was placed in jeopardy at that time. The Court might has returned a finding of guilty or not guilty with-

out further action by the prosecution or defense. As stated in Ex parte Ulrich (W.D.Mo. 1890) 42 F. 587, 595, where a somewhat similar factual situation was presented, "The law will give him the benefit of the presumption that the first jury might have acquitted him * * *."

We have no doubt that emergent situations, unknown to the civil courts, may arise in the administration of military justice which will call for the exercise of the doctrine of imperious necessity. The judicial process will be equal to such demands. That the absence of witnesses does not sanction the exercise of the doctrine is, however, no longer open to question. The Federal courts have spoken, and, " * * * no Court has gone to * * * [that] * * * extent." The rule is applicable to all courts, whether trial be with or without a jury (Kepner v. United States, supra), and since Grafton v. United States (1907), 206 U.S. 333, 51 L.Ed 1084, if not before, there has been no doubt that a general court-martial, within its special framework, is a court in the fullest sense of the word.

We see nothing which renders the absence of witnesses, as shown by the record of trial in this case, an emergent situation in exception to the rule in the Federal courts. Their witnesses may lie beyond the reach of process, if process issues witnesses may not respond, oral promises to appear may not be kept, and they may become ill during trial; but such difficulties in proof are not grounds for a termination of trial and a second prosecution. Imperious necessity means a sudden and overwhelming emergency, uncontrollable and unforseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency. The absence of witnesses, as the Federal courts have uniformly held, is not an emergent condition infecting the judicial process; it is only one of the hazards of trial known to all courts.

As affirmatively disclosed by the record, the continuance of the case was prompted by the court's desire to hear further testimony, and the withdrawal of the charges and the refefence of them to another court was occasioned by the absence of the witnesses from the juris-

diction of the appointing authority. This did not constitute the emergent situation infecting the judicial process required for the termination of the case so as to except the proceedings from the prohibition against double jeopardy in the Fifth Amendment. Wade's plea in bar in the instant case, being seasonably raised and supported by competent evidence, should, then, have been sustained. "American justice," as Vinson, J., said in Pratt v. United States (App. D.C. 1939) 102 F. (2nd) 275, 280, "will not countenance an accused standing trial twice for the same offense * * * ."

(b) There remains for consideration the language of Article of War 40 which provides that:

" * * * no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

It was urged by the Trial Judge Advocate at the trial (R 9, 10) that this language precludes a plea in bar on the ground of former jeopardy until action has been taken by the reviewing authority and, if there be one, the confirming authority; but we do not agree. The language, by its own terms, is plainly limited to those cases in which findings of guilty have been reached by the Court, and does not purport to apply to situations where trial is terminated prior thereto. It is plain and unambiguous, and does not permit the interpretation suggested. Congress obviously desired to provide for a rehearing upon disapproval by the reviewing or confirming authority of findings of guilty (Article of War 50), and the care it took to limit the sentence upon a rehearing and to prohibit rehearings upon findings of not guilty is evidence of the concern it entertained that the rights of an accused under the Fifth Amendment should not be frustrated. It provided for the automatic review of the findings and sentence, and the consent of the accused to such review being true in fact and presumed as a matter of law (Sanford v. Robbins, supra), a plea of former jeopardy may not

necessarily be interposed at the second trial (Sanford v. Robbins, supra). This is explainable by "analogy to a mistrial for failure of a jury to agree, since the reviewing authority whose concurrence is necessary does not agree, defeating the first hearing" (Sanford v. Robbins, supra, 115 F. (2nd) at p 439.; or by an analogy to the vacation of a verdict at the instance of an accused who thereby waives his protection against double jeopardy (Pratt v. United States, (App. D.C. 1939), 102 F. (2nd) 274), inasmuch as the consent of an accused to review by the reviewing or confirming authority is presumed as a matter of law.

If, however, Article of War 40 were ambiguous and subject to construction, doubts and ambiguities would yield to the persuasions of the Fifth Amendment, as an interpretation consistent with the constitution is preferred to one offensive thereto (McCullough v. Commonwealth of Virginia (1898) 172 U.S. 102, 43 L.Ed. 382), and as a construction leading to absurd consequences is avoided whenever a reasonable one is possible (United States v. Katz (1926), 271 U.S. 354, 70 L.Ed. 986).

Nor can the provisions of the Manual for Courts-Martial 1928, which provide that a nolle prosequi may be entered either before or after arraignment and plea and that it is not a ground of objection or of defense in a subsequent trial (MCM, 1929, par. 72, p. 57), and that the appointing authority may withdraw any specification or charge at any time unless the Court has reached a finding thereon (MCM, 1928, par. 5, p. 4), be construed to sanction the proceedings in this case. They too must be construed in sympathy with the Fifth Amendment and Article of War 40, which are not limitations on the power of the appointing authority to direct the entry of a nolle prosequi or to withdraw charges, but are limitations on the power to again try an accused after jeopardy has attached. The appointing authority has the undoubted power to direct the entry of a nolle prosequi before or after arraignment and plea, or to withdraw charges at any time prior to the findings, but when jeopardy has attached, and imperious necessity does not exist a nolle prosequi or to withdraw charges, but are limitations on the

stitutionality rather than to construe it so that it will run afoul of constitutional prohibitions. The power vested in the appointing authority to withdraw charges is a valuable and necessary administrative device and it may be preserved to him if its exercise is based upon the doctrine of "imperious necessity" as such doctrine is adjusted to meet the needs peculiar to the functioning of a courts-martial.

A frank recognition of the legal principle that jeopardy may attach before findings by a courts-martial seems imperative under the approved construction of the "double jeopardy" clause of the Fifth Amendment. On this major premise I believe that the doctrine of "imperious necessity" may for the reasons herein set forth, be expanded to include tactical situations which in the opinion of the appointing authority makes impractical the production of necessary witnesses. With that determination he may then exercise the power of withdrawal of the charges in accordance with the provisions of the Manual. Under such process of reasoning the Manual' provision is valid. Stated otherwise: The appointing authority may withdraw any specification or charge at his direction at any time before jeopardy attaches (CM ETO 9986, Goldberg), and he may withdraw any specification or charge after jeopardy attaches when "imperious necessity" dictates and "imperious necessity" in the functioning of military courts includes military necessity and tactical considerations.

8. I therefore conclude that the Commanding General of the 76th Infantry Division was authorized to withdraw the charge in the instant case from the court sitting at Pfalzfeld, Germany on 27 March 1945 and transmit the same to another jurisdiction for trial and that his action did not afford the accused the right to plead former jeopardy at the trial now under review.

9. I concur with the Board of Review in its conclusion that accused in the present trial was proved guilty of the crime charged. No errors prejudicial to the substantial rights of accused were committed at the trial, and the court had jurisdiction of the person and the offense. In

my opinion the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. I transmit herewith forms of action in the alternative; one for use in the event you are in accord with conclusion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence and one for use in the event you agree with the conclusion set forth in this, my dissent, that the record of trial is legally sufficient to support the findings of guilty and the sentence. Alternative drafts of appropriate orders promulgating your conclusions are also transmitted herewith.

11. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15320. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15320).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls: Incl. 1: Record of Trial. Incl. 2: Alternative drafts of action. Incl. 3: Alternative drafts of court martial orders.

Transcript of Proceedings on Hearing of Respondent's Motion for Reconsideration, July 10, 1947.

---

109 HON. ARTHUR J. MELLOTT, Judge, presiding.

Appearances: N. E. Snyder and Richard T. Brewster, appeared for Petitioner. James W. Wallace, Assistant U. S. Attorney, appeared for Respondent.

Be it remembered, on this 10th day of July, A. D. 1947, the above matter coming on for hearing before the Hon-

orable Arthur J. Mellott, Judge of the District Court of the United States for the District of Kansas, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

Mr. Snyder: Petitioner is ready, if the Court please.

Mr. Wallace: The respondent is ready.

The Court: State your appearances for the record, please, gentlemen.

Mr. Snyder: R. T. Brewster and N. E. Snyder appearing for the petitioner, Frederick W. Wade.

Mr. Wallace: James W. Wallace appearing for the respondent.

The Court: You may proceed.

Mr. Wallace: If the Court please—

Mr. Snyder (Interrupting): Mr. Wallace, if I might interrupt you a minute.

If it please the Court, we wish at this time to interpose our objection to the hearing or consideration of this motion which has been filed on behalf of the respondent, requesting that Your Honor reconsider your decision entered in this cause on May 9, 1947. If I may, I should like briefly to be heard on that in advance of any argument on whatever merits there may be to the motion for reconsideration.

The Court: We will hear you.

Mr. Snyder: As we interpret the Federal Rules of Civil Procedure all post-decision motions are governed by those rules. The rules specifically state, Rule 81, that they shall apply where there is no procedure outlined by other—otherwise outlined by statute so far as habeas corpus proceedings are concerned. That language is as follows: "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings

is not set forth in statutes of the United States and has hereofore conformed to the practice in actions at law or suits in equity * * *" and listing among other proceedings, habeas corpus.

Now, there is no decision for post-trial motions in the habeas corpus statute, if the Court please. Therefore, we say that the Federal Rules of Civil Procedure govern this proceeding.

Now, with the advent of the Federal Rules of Civil Procedure, as Your Honor well knows, the term "limitation" or "rule" has been abolished. The rule to which I am referring was the one well known to Your Honor and all judges and lawyers that during the term of Court the Court has absolute control over its own judgments. Now that period of limitation has now been fixed at ten days by virtue of the provisions of Rule 59, sub-division (b). That rule requires that a motion for a new trial be served not later than ten days after the entry of the judgment except for a motion on the ground of newly discovered evidence, which may be made after the expiration of that period and before the expiration of the time for appeal.

Now, on a motion for a new trial, if it's timely filed, Your Honor may, if you are so advised and so determined on the record, in a case tried without a jury, open a judgment if one has been entered or take additional testimony, amend findings of fact, conclusions of law or make new findings or direct the entry of a new judgment. Now, that is the relief which they are asking in this motion. They have asked that the Court reconsider its decision
111 and opinion herein and make and enter its orders fixing the time and place where the respondent may submit additional evidence in proof of the facts hereinabove alleged with opportunity afforded the petitioner to submit countervailing evidence if he may desire. That is exactly the relief they are asking. They have filed no post-trial motion within ten days after the date of the decision as the rules require. There is only one other provision under which they might seek this or similar relief and that is under the provisions of Rule 60, but they have not attempted to bring themselves within the scope of the operation of that rule which provides that, "On motion

the Court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." No one of those three factors appears in this case; neither mistake, inadvertence, surprise or excusable neglect, those four factors—correction. They do not base their motion on that ground.

There has been a very recent decision of the United States Supreme Court construing an analogous provision in the new Federal Rules of Criminal Procedure. That is the case of the United States of America v. Honorable William F. Smith, a District Judge of the United States. The case was decided June 2, 1947, and is reported in 91 Law. Ed. Advance Opinions at page 1203. I will close with a brief summary of that case, Your Honor, and point out the principles which we think are there expounded and control action in this case. There, the defendant had been tried and convicted. He filed a timely motion for a new trial and assigned some fifty-four reasons why it should be granted. An appeal—the motion was denied. An appeal was taken and the Circuit Court of Appeals for the Third Circuit affirmed. The man was incarcerated and on the day following that the judge undertook to enter an order granting a new trial on the basis that he had reconsidered the grounds urged by the defedant in support of the motion for a new trial. In other words, the element there is the same as in this case, a reconsideration. The prisoner was released from the penitentiary on bail, and the question for decision in this case,
112 Your Honor, was whether or not the Court had the power to act after—on his own initiative after the expiration of the period provided by the Federal Rules of Civil Procedure. Rule 33—if I said Civil Procedure that was a—will you correct it? (Speaking to reporter.)

Rule 33 provides—of your Federal Rules of Criminal Procedure that if the trial was by the Court without a jury the Court may vacate the judgment it rendered, take additional testimony and direct the entry of a new judgment; quite similar to Rule 59 of the Federal Rules of Civil Procedure, but the provision is in this rule that a

motion for a new trial based on any other ground should be made within five days after the verdict or finding of guilty; that is, any other ground than newly discovered evidence.

The Court discusses that and ends up by holding that the Trial Court was without power to enter that order; that the ten-day period limited the right or the request for relief if not made within that time; the Court was without power to grant it on the Court's own initiative.

In the Opinion by Mr. Justice Jackson it was said: "We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the Court's own initiative." They point out in the course of this opinion that the Rules of Civil Procedure provide that there is a timely limit given on which the Court may act on his own motion, so for those reasons and on the analogy of that case, Your Honor, we say that the Court is without power to entertain this motion they have now filed for a reconsideration of Your Honor's decision. They have not set up any of the grounds which would entitle them to come under the provisions of Rule 60, and they did not appear within ten days after the entry of the judgment, and they do not say they have any newly discovered evidence. They simply ask Your Honor to reconsider it and change your mind. We say now you are without jurisdiction to do so.

---

113 Mr. Wallace: If the Court please, I am aware of Rule 59 which requires that in the Rules of Civil Procedure that a motion for a new trial or for other relief should be filed within ten days and urged to the Court, but it is further the contention that Rule 59 should be considered along and in the light of Rule 81 which was just read to the Court, I believe, by Mr. Snyder which is: "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United

bar a second prosecution in the event the accused pleads and proves his former jeopardy at the second trial.

Neither the provisions of the Manual nor Article of War 40 could confer power inconsistent with the Constitution. Executive orders and congressional acts have validity only to the extent that they are obedient to the Constitution.

6. The charge sheets show that Wade is 28 years seven months of age and was inducted 21 June 1943, and that Cooper is 31 years of age and was inducted in May 1941. Both were inducted to serve for the duration of the war plus six months. Neither had any prior service.

7. The Court was legally constituted and had jurisdiction of the persons and the offenses. Except as noted herein no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that Wade's plea in bar should have been sustained, and that the record of trial is legally insufficient to support the findings of guilty and the sentence as to him.

(Signed) LESTER A. DANIELSON, Judge Advocate.

(Signed) MARTIN D. MEYER, JR., Judge Advocate.

(Signed) JOHN R. ANDERSON, Judge Advocate.

---

(98) ETO 15320 Cooper, Thomas; Wage, Frederick W.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 21 Nov. 1945 To: Commanding General, United States Forces, European Theater (Main) APO 757, U. S. Army.

B-3 Pursuant to the provisions of the third paragraph of Article of War 50½, I transmit herewith the record of trial in the case of Private First Class Frederick W. Wade (39208980) and Private Thomas Cooper (35766893), both of Company K 385th Infantry (accused

Cooper was acquitted by the Court) and the holding of the Board of Review that as to accused Wade the record of trial is legally insufficient to support the findings of guilty and the sentence. I do not concur in the holding of the Board of Review and I submit for your consideration and action my dissent therefrom.

2. The Board of Review in its opinion has accurately summarized the facts pertinent to the issue which arose on accused's plea of former *jeparty*. I hereby adopt the same for purposes of my discussion. I am in accord with the Board of Review in its analysis of the principles of law applicable to the plea of former jeopardy and subscribe to the doctrine expressed in the opinion that in the trial of cases before general courts-martial, jeopardy within the meaning of the relevant provision of the Fifth Amendment to the Federal Constitution may attach prior to findings by the Court and approval of the sentence by the reviewing authority. I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment and the adjudications of the Federal Courts with respect to the "double jeopardy" clause thereof. I also believe that the doctrine of "imperious necessity" as defined and discussed in the opinion of the Board of Review is applicable to courts-martial. My difference with the Board of Review revolves about the question as to the operative effect of the doctrine in trials before courts-martial and in the administration of military justice. Stated cogently the solution of the problem largely turns upon the applicability of the principles discussed in the opinion of the Circuit Court of Appeals (9th Cir.) in the case of Cornero v. United States (C.C.A. 9th, 1931) 48 F. (2nd) 69 (cited and discussed by the Board of Review) to the facts in this case.

3. I freely grant that in criminal prosecutions in the civil courts the rule of the Cornero case is not only fair and proper but is also dictated by sound constitutional principles.

The fact that the prosecutor, having entered upon the trial of an indictment and having thereby placed an accused in jeopardy, discovers he cannot sustain the same

without additional evidence, presents no legitimate reason for invoking the doctrine of "imperious necessity" so that the accused may again be tried on the same charge. The denial of the application of the doctrine under such circumstances is highly necessary if the constitutional provision against double jeopardy is not to be frittered away by legalistic sophistries. There are substantial reasons for refusing to consider the absence of witnesses as an "imperious necessity" in the trials of criminal causes in the civil courts. The place of the trial and the terms of court are fixed and determined by statute. The Court in advance of the commencement of the term according to usual practice sets the criminal cases for trial on stated dates and its calendar become matter of public notice. The prosecution therefore knows in advance approximately when it must be prepared to go to trial and have its witnesses available to testify in Court. Congress has provided by law the process whereby witnesses may be subpoened or may be held in custody pending their appearance at trial. If under these circumstances the prosecution ventures trial, participates in the selection of the jury and thereafter presents its available evidence, it does so with the full knowledge of the risk it incurs by placing accused in jeopardy. It is not, however, without remedy to care for the situation caused by unforeseen absences of witnesses. A motion for continuance, validly based, affords it reasonable means to prevent a miscarriage of justice. Under these circumstances the prosecution having failed to "make a case" should not be permitted to dismiss the indictment and try again for a conviction under circumstances which may be more favorable for success. Such methods are not consonant with our juridical philosophy and offend our sense of fair dealing and fair trials.

4. However, the static conditions of the civil courts do not prevail with respect to the military courts and particularly the military courts which must function in the field of operations and combat. Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon

other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sitting. There are no terms of courts-martial (Cf: CM ETO-16623, Colby), and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

5. Aside from the inherent differences between our military and civil courts there is an aspect of the actual functioning of the former which must be given proper weight and consideration. Witnesses may be compelled, under penalty of law, to attend and give testimony in the civil courts of the United States. The witnesses come to the court; the court does not go to the witnesses. In this respect there is a certainty and security upon which the prosecution and defense alike may rely. With respect to the courts-martial sitting in the United States the same condition prevails (AW 23). In the functioning of our military courts in the field, however, and particularly in foreign countries entirely different conditions exist. In England by virtue of the Untied States of America (Visiting Forces) Order, 1942 (SR and O, 1942 No. 966) and orders of the (British) Army Council and Air Council (SR and O, 1942 No. 1679), compulsory attendance and testimony of British civilian witnesses are provided. In France, the attendance of civil witnesses largely depends upon the cooperation of the French police or the voluntary action of the inhabitants. In Germany, the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror. In the case of the latter country, however, practical considerations will weigh heavily against theoretical possibilities. At the time of the first or incomplete trial, in the instant case it is a matter of notorious knowledge that

the ordinary means of travel in Germany were disrupted and in some areas entirely destroyed. While it is entirely possible in spite of combat conditions then prevailing at the time of the first trial on 27 March 1945 at Pfalzfeld, Germany, the necessary additional witnesses might have been produced by the prosecution at an adjourned session of the trial, that fact remains a matter of speculation. There is nothing in the record of trial upon which to base a reasonable assurance that effective means were available to the prosecution, whereby these witnesses could be produced. The court at the first trial after deliberating in closed session opened court and expressed the desire:

"that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The court will be continued until a later date set by the TJA" (R 60 of Defendant Wade's Exhibit "A").

Seven days later and prior to further action by the court the appointing authority, Commanding General, 76th Infantry Division, withdrew the charges from the court which had been appointed by him and to which he had previously referred the charges for trial (R 9; Pros. Ex A), and directed that no further action in the case be taken by the court. The Board of Review narrates the subsequent proceedings as follows:

"On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impractical and precluded prompt disposition of the case. * * * Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the

Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction * * * (p. 3, underscoring supplied.)

6. The Board of Review has, in my opinion, most properly designated the doctrine of "imperious necessity" as

> "an illusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow * * *. All courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances."

I believe that the situation disclosed in the instant case is, in the application of the doctrine to the military courts, well within the description of "urgent circumstances," notwithstanding the general accepted limitation of the civil courts,

> "that the absences of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense * * *."

The bases for my conclusions are: First, the inherent differences between the civil and military courts with respect to the permanency of their places of trial and the certainty of their administrative practice and court routine. These differences I have explained above. Second, the difficulty in securing the presence of civilian witnesses who are foreign nationals at a trial when a military court sits in a foreign country of the status of Germany. I have likewise discussed this problem above. Third, the tactical situation confronting an appointing and referring authority in the field when his forces are engaged in actual combat or are performing important police and occupational duties. On this point I desire to make further comments.

It is manifest that Congress intended to provide a mechanism in the administration of military justice whereby the courts would be able to function with reasonable efficiency and competency during the course of field operations in time of war. In order to ensure this flexibility and adaptability Congress imposed upon the appointing authority the administrative responsibility for the proper functioning of the general courts-martial of his jurisdiction. In order to permit him to meet this responsibility it was necessary to vest him with broad discretion in determining where and when the court should sit and what cases should be tried by it (cf: CM ETO 1554, Pritchard). Particularly when his command is engaged in the field in a foreign country under combat conditions or in occupancy of the country of a conquered enemy, his power and authority in this respect is of the utmost importance in the maintenance of discipline of his subordinates and in the performance of duties placed upon his command.

In the instant case the Commanding General of the 76th Infantry Division determined, in the exercise of this discretion that:

"the tactical situation made the obtainment of the witnesses impractible and precluded prompt disposition of the case" (p. 3).

When he learned of the request of the court that certain witnesses whose testimony it considered of importance should be produced, he was faced with a problem peculiarly within the scope of his authority. It involved something more than the problem which would confront a district attorney in the trial of a similar case in a civil court. The Commanding General was called upon to determine not only how these witnesses would be produced but also whether it was advisable to bring them to the place of trial. Consideration of the last question involved many factors of which he was the best judge, among which were the expediency and desirability of transporting German witnesses from their homes to the place of trial when the witnesses must be moved a considerable distance in time of combat; the methods and means of feeding and billeting them while they were absent from their homes, and

the time and effort for his personnel consumed in this effort. My difference with the Board of Review centers at this point. I cannot believe that the doctrine of "imperious necessity" when applied to our military courts is so limited as not to encompass this situation. I recognize it as a doctrine of limited application, but I believe that it does include the right of the appointing authority to stop the trial of a cause and withdraw the charges when there is presented to him for decision a problem possessing the complexities here involved. When he determined that the factical situation of his troops required that the trial be taken to the witnesses rather than the witnesses be brought to the trial, he decided a question which involved the military necessities of his command. It is not an unreasonable expansion of the doctrine of "imperious necessity" to include tactical situations which the appointing authority deems of sufficient seriousness as to prevent the production of necessary witnesses at the trial where the court then sat.

7. I have elected to discuss the legal problems here presented within the ambit of the opinion of the Board of Review rather than place my dissent upon the literal interpretation of the Manual for Courts-Martial which directs:

> "[an appointing authority] may withdraw any specification or charge at any time unless the court has reached a finding thereon" (MCM 1928, par. 5, p. 4).

I adopt this method of approach because I recognize that if the quoted provision of this Manual be given a literal application its validity is immediately called into question as a result of the interpretation of the "double jeopardy" clause of the Fifth Amendment by the Federal courts. Well defined constitutional principles appear to deny the right of the approving authority to withdraw the charges once jeopardy has attached to accused if such withdrawal is prompted solely by the fact that the prosecution has failed in its proof and the appointing authority capriciously desires to afford the prosecution another opportunity to secure a conviction. Under established canons of statutory construction the quoted provision of the Manual should be construed so as to uphold its con-

to refer it to the Commanding General of the Third Army for trial before another court-martial. Such determination of the Commanding General was somewhat analogous insofar as double jeopardy is concerned to the determination of the judge of a civil court that in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury. Under the circumstances, the withdrawal of the case from the court-martial on the ground that the tactical situation made it impossible to produce the witnesses before the court-martial within a reasonable time and the subsequent trial before another court-martial did not subject petitioner to double jeopardy in violation of the Fifth Amendment.

The judgment of discharge is reversed, and the cause is remanded with directions to enter judgment denying the petition for the writ of habeas corpus and to remand petitioner to the custody of respondent.

Phillips, Chief Judge, dissenting:

Wade, hereinafter called petitioner, and one Cooper were charged with rape in violation of the 92nd Article of War.[1] They were tried jointly by a General Court-Martial constituted by the Commanding General of the 76th Infantry Division. The Court-Martial convened at Pfalzfeld, Germany, a town 22 miles from Krov, on March 27, 1945. Both the prosecution and defense presented testimony and rested. After the arguments had been presented, the case was submitted. After the Court-Martial had entered upon a consideration of its verdict, it announced that the case would be reopened for the production of additoinal witnesses with respect to the identity of the accused.[2]

---

[1] 10 U. S. C. A. § 1564.

[2] "Law Member. The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T.[rial] J.[udge] A.[dvocate].

The Court then, at 1700 o'clock, P. M., 27 March, 1945, adjourned to meet at the call of the President."

Thus, it will be seen that the sole reason for reopening and continuing the case was the absence of witnesses.

Thereafter, on April 2, 1945, the Commanding General of the 76th Infantry Division dissolved the Court-Martial and transmitted the charges and allied papers in the case to the Commanding General of the Third United States Army with the recommendation that the charges be tried by General Court-Martial. In the letter of transmittal set forth below,[3] the Commanding General of the 76th Infantry Division stated that the case had been previously referred for trial by General Court-Martial which had entered on the trial; that two witnesses were unable to be present and the case had been continued so their testimony could be obtained; that due to the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. Thus, it will be seen that the reason the Court-Martial was dissolved and the case transferred was the inability to produce conveniently the absent witnesses. There is no suggestion in the letter of transmittal or in the record here that the members of the Court-Martial were unable to proceed with the trial or that the trial could not be completed by such Court-Martial because of the tactical situation. Had the witnesses been there present, there seems to be no doubt that the trial could have been completed by such Court-Martial. Hence, its dissolution was due solely to the absence of witnesses for the prosecution.

No further action was taken until April 18, 1945, when the Commanding General of the Thrid United States Army transferred the charge to the Commanding General of the 15th United States Army. On April 26, 1945, the Commanding General of the 15th United States Army constituted a

---

[3] "1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

General Court-Martial at Bad Neuenahr, Germany, a town approximately 40 miles from Krov, on June 30, 1945. Petitioner interposed a plea of double jeopardy. It was overruled. The trial proceeded, resulting in the conviction of petitioner and the acquittal of Cooper.

The record in petitioner's case was submitted for review to the Staff Judge Advocate, 15th Army, pursuant to Article of War 46.[1] That reviewing authority, in a written opinion, held the record of trial legally sufficient, but recommended that the sentence be reduced, in view of petitioner's combat record. The Commanding General, 15th United States Army, approved the sentence, but reduced the period of confinement to 20 years. In compliance with the provisions of Article of War 50½,[2] petitioner's records were transmitted to the Branch Office of the Trial Judge Advocate in the European Theater of Operations for review. Board of Review No. 4 in that office concluded that the record of trial was legally insufficient on the ground that petitioner's plea of double jeopardy should have been sustained. The basis of that Board's finding was that the absence of witnesses did not come within the purview of the "imperious necessity" rule.

In further compliance with Article of War 50½, the record was forwarded to the Staff Judge Advocate General of the Branch Office, who dissented from the holding of the Board of Review on the ground that the decision of the Commanding General of the 76th Infantry Division that "a tactical situation made the attainment of the witnesses impractical and precluded prompt disposition of the case," was a determination which fell within the doctrine of imperious necessity. The case then passed to the Commanding General, United States Army, European Theater, under the provisions of Article of War 50½. He upheld the conviction.

Pefitioner, being confined under the sentence in the United States Penitentiary at Leavenworth, Kansas, filed his ap-

[1] 10 U. S. C. A. § 1517, and Par. 87(b), Manual for Courts-Martial.

[2] 10 U. S. C. A. § 1522.

plication for a writ of habeas corpus. The trial court granted the writ and discharged petitioner from custody.

Where a case is tried to a court jeopardy attaches when the accused has been indicted and arraigned, has pleaded, and the court has begun to hear evidence.[1]

Jeopardy undoubtedly attached unless the discontinuance of the trial, the withdrawal of the charges from, and the dissolution of, the first Court-Martial were justified under the "imperious necessity" rule.

To justify the discharge of a jury or other fact-finding body before verdict under the doctrine of imperious necessity, the reasons therefor must be emergent, urgent, and manifestly compelling.[2] It is a power which should be exercised with caution and only under urgent circumstances.[3]

The causes for which a jury may be discharged before verdict are stated in Wharton's Criminal Law, 12th Ed., Vol. 1, § 395, as follows:

"* * * The only causes for which a jury impaneled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are: (1) Consent of the prisoner; (2) illness of (a) one of the jurors, (b) the prisoner, or (c) the court; (3) absence of a juryman; (4) impossibility of the jurors agreeing on a verdict; (5) some untoward accident that renders a verdict impossible; and

---

[1] McCarthy v. Zerbst, 10 Cir., 85 F.2d 640, 642, and cases there cited;
Clawans v. Rives, App. D.C., 104 F.2d 240, 242;
Daniels v. State, ——Okl.——, 29 P.2d 997, 998.

[2] United States v. Perez, 22 U. S. 579;
Simmons v. United States, 142 U.S. 148, 153;
Klock v. People (N. Y.), 2 Park. Crim. Rep. 678, 683, 684;
People v. Barrett (N. Y.), 2 Caines 304, 308;
United States v. Watson, D.C.N.Y., Fed. Cas. No. 16,651;
Commonwealth v. Fitzpatrick, ——Pa.——, 15 A. 466, 467;
Allen v. State, 52 Fla. 1, 41 So. 593;
Baker v. Commonwealth, 290 Ky. 165, 132 S.W.2d 766, 767;
State v. Grayson, ——Fla.——, 23 So.2d 484.

[3] In United States v. Perez, 22 U. S. (9 Wheat.) 579, the court said:

"* * * The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

We are also, and the Court is well aware of the rule that provides in those cases where the judgment of a Court is retained in the breast of the Court subject to his correction or modifications or additions as he desires.

Now, it is our contention here that the rule in this case is the latter one, the one I have just announced. We feel that the rule in habeas corpus is not one that was governed by the former practice, either at law or in equity. Consequently, the Court comes around to the point where he can consider this case in the general rule that the Court has the authority to modify those opinions, decisions, determinations which he retains. Consequently, we feel that the Court has—we may correctly urge here what information we would show to the Court on a motion—in this motion for reconsideration and that the Court might wish in the light of what information might be submitted to modify or amend its opinion.

The Court: The contention made by the petitioner in this case presents a matter which the Court itself had given some consideration to at the time that the respondent's motion for reconsideration was filed.

The case was fully tried before this Court several months ago as habeas corpus proceedings customarily are tried upon the record before the court martial whose judgment resulted in the incarceration of the petitioner in the habeas corpus proceeding.

114 Generally, the Court in sitting in a habeas corpus proceeding is limited in the action which it may take by the well-established rule of law that a habeas corpus proceeding is tried upon the record; and, if the record indicates that the Court or the tribunal imprisoning the petitioner was duly constituted, acted within the limits of its jurisdiction and imposed the sentence which was imposed,

the legality of the detention of the petitioner would rest there and upon that record—in the absence of what the Court may inaccurately refer to as some modification of the earlier rule in habeas corpus proceedings authorizing a Court in a habeas corpus proceeding to receive evidence de hors the record in a limited number of instances—the case would be decided. That rule, it seems to this Court, is itself quite limited and requires a Court reviewing a record or the legality of the detention of a petitioner in a habeas corpus proceeding to limit the scope of the inquiry to whether, by evidence de hors the record, the petitioner is able to establish that he was deprived of a right granted to him by the Constitution of the United States. Cases applying that rule fall generally into the category of where the petitioner is able to show by such evidence, for example, that he was deprived of his right to be repesented by counsel at every step of a criminal proceeding or perhaps where he is able to show that the rights accorded him under the Constitution to be tried by a jury duly selected in accordance with the law had been ignored or he had been deprived of some such rights.

Manifestly, some of the observations which the Court has made so far are perhaps more pertinent to the motion for reconsideration itself rather than being addressed to the question presented to the Court at this juncture; namely, whether there is anything that this Court should be considering at this time growing out of or springing from the motion for reconsideration which was filed in this Court considerably more than ten days after the opinion was promulgated and the order authorizing the
115 release of the petitioner was entered. Such opinion was filed and duly entered in this Court, I believe, on the 9th day of May, 1947. That was the final judgment and order entered by this Court. The petitioner was not actually released in accordance with the Court's order for a period of approximately ten days, some time having been consumed in complying with the requirement, which this Court had advisedly made, that the petitioner be required to give a good bond for his ultimate appearance in the event the case should be reversed by an Appellate Court. Thus, the order itself, I think, became a final order of this Court on May 9, 1947.

This Court, is always reluctant to be too adamant in applying purely technical rules of procedure if by so doing there is any likelihood that it is depriving one of the parties litigant of a substantial right. However, the rules of civil procedure are prescribed for the guidance of this Court precisely as they are for the guidance of other Courts, and this Court feels that it should make every reasonable effort to give them full effect.

A motion for reconsideration, it seems to the Court, is essentially a motion for a new trial. The trial has been concluded, final order has been entered and the Court must recognize that it is through with that particular case unless it is reopened and reviewed in the manner and under the circumstances contemplated by the statutes and the rules.

The Rules of Procedure lay down some principles to which the Court's attention has been redirected this morning. First, that a motion for a new trial should be filed within ten days after the final order of the Court. There are other rules permitting the Court to reopen the proceedings within a much later period provided the conditions are extant which give rise to the application of those rules. One, of course, is Rule 60 authorizing the correction of clerical mistakes or granting relief from the judgment or order on proper motion to relieve any party against mistakes, inadvertance, surprise or excusable neglect. This Court has considerable doubt that the motion for reconsideration presently filed and to which we are now making reference falls within that category.
116 There appears to be no attempt to frame the motion on any of those grounds or to have the Court reconsider for the purpose of correcting any matters which should be corrected.

This Court is familiar with the recent decision of the Supreme Court—United States v. Simth, —U.S.— (June 2, 1947)—which counsel has just read and which pertains to a criminal case. The opinion is, of course, conclusive upon this Court and must be applied but, in addition to that, the rule enunciated is most sound and reasonable; for, as I recollect the facts, without attempting to state them in detail, here is about what occurred:

After a final judgment had been entered by a District Court the case went to the Circuit Court of Appeals. After the Circuit Court of Appeals had gotten through with the case, a remand to the District Court was entered and the case was sent back. The district judge then attempted to grant a new trial on the theory that he could do so since he had given reconsideration to the grounds urged. The Supreme Court properly pointed out that a district judge should have, and should be allowed to take, all the time necessary to consider questions of law arising in the case, including questions of law arising on a motion for a new trial; but when he has finally entered his ruling he is then through with the case and thereafter all that he can do is to obey the mandates of the higher Courts.

This Court feels that it has reached the same stage in this proceeding. The matter was fully and completely, and the Court may even add expertly, tried before this Court. Carefully prepared briefs were filed by both parties. The Court ultimately found the time to give consideration to the record, the evidence, the arguments and the briefs filed by the parties. The record was carefully reviewed and a perhaps unduly lengthy opinion was written. This Court is now of the opinion, gentlemen, that it should not at this time attempt to reconsider the case; so the present holding will be: first, that the motion for reconsideration appears to be in the nature of a motion
117 for a new trial not filed within time; and, second, that this Court does not feel that it now has authority to reconsider the case.

Appropriate order may be prepared monumenting the views of the Court.

Mr. Snyder: Thank you, Your Honor.

Filed in the District Court July 25, 1947.

Clerk's Certificate to Record.

United States of America, District of Kansas, ss:

121 I, Harry M. Washington, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be true, full, and correct copies of so much of the record and proceedings in case No. 980 H. C., entitled Frederick W. Wade, Petitioner vs. Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in said Court, as is called for by appellant's Designation of Record on Appeal and Appellee's Designation of Additional Portions of the Record, Proceedings, and Evidence to be included in Record on Appeal, on file herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 17th day of September, 1947.

(Seal.) HARRY M. WASHINGTON, Clerk.

Filed September 30, 1947.—Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

First Day, May Term, Monday, May 10th, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frederick B. Wiener, Esquire, appearing for appellant, R. T. Brewster, Esquire, and N. E. Snyder, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

[September 7, 1948.]

Frederick Bernays Wiener, Special Assistant to the Attorney General, (Randolph Carpenter, United States Attorney and James W. Wallace, Assistant United States Attorney, were with him on the brief) for Appellant. R. T. Brewster and N. E. Snyder for Appellee.

Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges.

Bratton, Circuit Judge:

Frederick W. Wade, hereinafter referred to as petitioner, was a Private First Class in the 76th Infantry Division of the Army, engaged in the prosecution of the war in the European theater. He was charged under the ninety-second Article of War, 41 Stat. 805, 10 U.S.C.A. §1564, with the rape of a German woman. A duly constituted general courtmartial began the hearing of the charge. The prosecution and the defense each introduced testimony, rested and submitted oral argument; and the court closed. Thereafter on the same day, the court opened, announced its desire to hear the evidence of three certain persons, and further announced that the court would be continued until a later date to be set by the trial judge advocate.

About seven days later, the Commanding General of the 76th Infantry Division withdrew the charge from the court-martial and transmitted it to the Commanding General of the Third Army with a recommendation of trial by court-martial. About two weeks later, the Commanding General of the Third Army transmitted the charge to the Commanding General of the Fifteenth Army with the request that the Fifteenth Army assume court-martial jurisdiction. The charge was then referred for trial to a general court-martial of the Fifteenth Army. Petitioner seasonably presented to that court-martial a plea of double jeopardy in bar of trial. The plea was denied; petitioner was found guilty; and he was sentenced to dishonorable discharge, total forfeitures, and imprisonment for life. The period of confinement was later reduced to twenty years. As thus modified, the sentence was approved and confirmed; and petitioner was confined in the federal penitentiary at Leavenworth, Kansas, for its service. He instituted this proceeding a habeas corpus against the warden of the penitentiary to secure his discharge from further confinement on the ground that the sentence was void for the reason that he was twice placed in jeopardy for the same offense. The warden answered; petitioner was produced in court; evidence was submitted; and the court entered judgment ordering the discharge of petitioner, 72 F. Supp. 755. Thereafter, the court entered an order denying the motion of the warden for a reconsideration. The warden appealed from the final judgment of discharge and also from the order denying the motion for reconsideration.

Article 1 of the Constitution of the United States empowers Congress to make rules for the government and regulation of the land and naval forces; and in the exercise of that power, Congress enacted Articles of War, effective June 4, 1920, 41 Stat. 787, 10 U.S.C.A. §1471, et seq. Article 3 provides that courts-martial shall be of three kinds, general, special, and summary. Article 4 provides that all officers in the military service, and officers of the Marine Corps when detached for service with the Army, shall be competent to serve on courts-martial for the trial of persons lawfully brought before such courts for trial. Article 5 provides that general courts-martial may consist of any

number of officers not less than five. Article 8 provides for the appointment of members of general courts-martial; Article 12 provides that general courts-martial shall have power to try any persons subject to military law for any crime or offense made punishable by the articles; and Article 92 provides that any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as the court-martial may direct, but that no person shall be tried by court-martial for such offenses committed within the States or the District of Columbia in time of peace. General courts-martial duly created in accordance with the controlling provisions of law are legal tribunals, clothed with authority to determine with finality any case over which they have jurisdiction; and their proceedings when duly confirmed are not open to collateral attack in a civil court except on jurisdictional grounds. Accordingly, where the petitioner in a case of this kind is being detained by virtue of a sentence of a general court-martial, the scope of the inquiry is limited to questions of jurisdiction of the court-martial, whether that court was properly constituted, whether it had jurisdiction of the subject-matter and of the person of the accused, and whether the sentence was one authorized by law. Ex parte Reed, 100 U.S. 13; Carter v. Roberts, 177 U.S. 496; Carter v. McClaughry, 183 U.S. 365; McClaughry v. Deming, 186 U.S. 49; Collins v. McDonald, 258 U.S. 416; Benjamin v. Hunter, ——F. (2d)——. But within the range of such limited review, a federal court has jurisdiction in habeas corpus to determine whether the sentence of the court-martial was void for the reason that petitioner was twice placed in jeopardy for a single offense, and if so to order his discharge. In re Snow, 120 U.S. 274; Hans Nielson, Petitioner, 131 U.S. 176; Clawans v. Rives, 104 F. (2d) 240; Amirine v. Tines, 131 F. (2d) 827.

It is the general rule that an accused is in jeopardy within the meaning of the guaranty against double jeopardy contained in the Fifth Amendment to the Constitution of the United States when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been empaneled and sworn; and where the case is tried to the court without the intervention of a jury,

jeopardy attaches when the court begins the hearing of evidence. McCarthy v. Zerbst, 85 F. (2d) 640, certiorari denied, 299 U.S. 610; Clawans v. Rives, supra.

But where it appears during the trial of a criminal case that a juror made false statements in the course of his voir dire examination respecting his relation to the defendant, where it appears that a member of the jury has been guilty of improper conduct in relation to the trial, where it appears that a juror was a member of the grand jury that returned the indictment, where it appears that a juror is too ill to proceed with the trial, where it appears that the jury is unable to agree upon a verdict, or where it appears that some other fairly like uncontrollable circumstance has arisen, and the court in the exercise of its sound judicial discretion discharges the jury, the constitutional guaranty against double jeopardy does not bar a subsequent trial before a different jury. United States v. Perez, 9 Wheat. 579; Simmons v. United States, 142 U.S. 148; Logan v. United States, 144 U.S. 263; Thompson v. United States, 155 U.S. 271; Dreyer v. Illinois, 187 U.S. 71; Keerl v. Montana, 213 U.S. 135; Pratt v. United States, 102 F. (2d) 275. However, the constitutional guaranty protects an accused against a second trial where the jury in the first trial was discharged solely on the ground that witnesses for the government were absent and therefore their testimony could not be adduced. Cornero v. United States, 48 F. (2d) 69; United States v. Shoemaker, 27 Fed. Cas. 1067; State v. Richardson, 25 S.E. 220; Allen v. State, 41 So. 593; People v. Barrett, 2 Am. Dec. 239; Pizano v. State, 54 Am. Rep. 511.

A valid charge was pending before the first court-martial. The court had jurisdiction of the subject-matter and of the person of petitioner, and evidence was introduced. Petitioner concedes that the Commanding General of the 76th Infantry Division was vested with authority to discharge the court or to withdraw the charge from it before completion of the trial, but that after the withdrawal petitioner could not be again placed on trial before another court-martial over his plea of former jeopardy. It does not appear from the record before us that any underlying basis for the action was set forth in the order withdrawing the charge and directing that no further action be taken by the court;

but in the communication of the Commanding General of the 76th Infantry Division transmitting the charge and related papers to the Commanding General of the Third Army it was recited in clear terms that the case had been referred to the court-martial for trial; that the trial was commenced; that the court continued the case in order that the testimony of certain witnesses could be obtained; and that due to the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. It thus appears that the withdrawal of the charge from the court-martial was not predicated solely upon the absence of the witnesses at the time of the trial, through oversight or otherwise, or solely upon the absence of the witnesses at the time the charge was withdrawn. Instead it is fairly clear that the withdrawal was based upon the tactical situation, intervening and developing after the trial which made it infeasible to produce such persons before the court-martial at its then location. Distance of the persons from the then situs of the court was one element entering into the situation. Perhaps other essential elements inhered in it. That the armed forces of the United States engaged in the prosecution of the war in that theater were moving rapidly and that conditions in the field were more or less fluid are matters of history of which judicial notice may be taken. It may be that due to hazardous surroundings, fluidity of conditions, or other emergencies arising out of the prosecution of the war, it was wholly infeasible if not impossible to produce the persons before the court at its location at the time of the withdrawal of the charges. On the other hand, it may be that distance or emergencies growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. But that was a matter to be determined by the Commanding General in the exercise of his sound discretion; and, taking into consideration the conditions and circumstances presenting themselves, he determined in the exercise of such discretion that the tactical situation made it necessary or advisable to withdraw the case from the court-martial and

(6) extreme and overwhelming physical or legal necessity. * * * "

Under the weight of authority, the absence of a witness or witnesses for the prosecution does not constitute grounds for the discharge of the jury under the doctrine of imperious necessity.[9]

When a prosecutor enters upon a trial, knowing that material witnesses for the prosecution cannot be produced, he takes the chance that his proof may fail, and he is not entitled to have the jury discharged in order to afford him an opportunity to produce the witnesses at a second trial; and the court may not of its own motion discharge the jury because of the absence of witnesses for the prosecution.[10]

Since it is my opinion that the sole reason the trial was adjourned, the charges withdrawn, and the Court-Martial dissolved was the absence of witnesses for the prosecution, it is my conclusion that the Commanding General of the 76th Infantry Division was not justified in dissolving the Court-Martial under the doctrine of imperious necessity.

It follows that when petitioner was subjected to the trial before the second Court-Martial, he was placed in jeopardy twice for the same offense in contravention of his rights under the Fifth Amendment to the Constitution of the United States.

The denial of his plea of former jeopardy may be raised in a proceeding on habeas corpus.[11]

For the reasons indicated, I respectfully dissent.

---

[9] Cornero v. United States, 9 Cir., 48 F.2d 69, 73;
Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511;
Allen v. State, 52 Fla. 1, 41 So. 593;
United States v. Watson, Fed. Cas. No. 16,651;
State v. Richardson, 47 S. C. 166, 25 S. E. 220;
State v. Williams, ——Mo.——, 92 S.W. 151, 152;
Note, 74 A. L. R. 803.

[10] State v. Homes, ——Fla.——, 15 So.2d 613, 615;
People v. Warden of City Prison, 202 N. Y. 138, 95 N. E. 729, 733;
People v. Barrett (N. Y.), 2 Caines 303, 308.

[11] Clawans v. Rives, App. D. C., 104 F.2d 240, 244;
Bens v. United States, 2 Cir., 266 F. 152, 157.

Judgment.

Seventy-second Day, May Term, Tuesday, September 7th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of discharge be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to enter judgmnet denying the petition for the writ of habeas corpus and to remand petitioner to the custody of respondent.

Petition for Rehearing of Appellee.

United States Circuit Court of Appeals

Tenth Circuit.

WALTER A. HUNTER, Warden, United States Penitentiary, Leavenworth, Kansas, *Appellant*,

vs.

FREDERICK W. WADE, *Appellee*.

Appeal from the District Court of the United States for the District of Kansas, First Division.

PETITION FOR REHEARING OF APPELLEE.

No. 3575.

PETITION FOR REHEARING OF FREDERICK W. WADE.

Comes now Frederick W. Wade and petitions the court for a rehearing upon the following grounds:

I.

The opinion and judgment of the court deny to petitioner the protection of the Fifth Amendment of the Constitution adopted as a safeguard against the conviction

and confinement of an innocent man by twice placing him in jeopardy for the same offense, a safeguard which is especially vital to soldiers tried by court-martial since they are not accorded the right of trial by jury, bail, appeal, and other safeguards granted civilians to insure against miscarriages of justice.

II.

The opinion and judgment of the court extend the doctrine of imperious necessity as applied to the Fifth Amendment to permit the Commanding General, not a member of the court-martial, to determine out of the presence of the court-martial and the person on trial that imperious necessity existed, and to presume that the Commanding General made such determination from an ex parte statement made *for* him that "due to the tactical situation, the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time," coupled with the fact that he did in fact withdraw the case, even though there was no proof as to what the *tactical situation* was or what the *distance* was or what the *reasonable time* was.

III.

The opinion and judgment of the court ruled the case upon grounds not relied upon by appellant who based his appeal on the ground the combat situation prevented the completion of the trial, whereas the court ruled the case on the ground it could be presumed that the Commanding General determined in the exercise of a sound discretion that it was infeasible, or impossible to produce the witnesses within a reasonable time and that, therefore, it was necessary or advisable to withdraw the case.

IV.

The opinion and judgment of this Court ignores the following findings of fact made by the court below:

1. The absence of witnesses, rather than an emergency due to the military situation, was the reason for the withdrawal of the case from the court-martial which first heard it. R. 25.

2. The Commanding General did not find that a military situation existed which required the discontinuance of the trial before the court appointed by him and the transfer of the cause to a jurisdiction where military conditions permitted the production of the witnesses. R. 24.

3. The "tactical situation" was not the motivating reason for discharging the first court-martial. R. 25.

These findings of fact are supported by substantial evidence, and are not clearly erroneous. The court, in setting aside these findings and making new and opposite findings, violated Rule 52 (a) Federal Rules of Civil Procedure and overruled a heretofore unbroken line of decisions of this Court, which decisions were cited on pages 9 and 10 of the supplemental brief for appellee and have been overlooked by this Court.

In connection with this point and other points, your petitioner requests permission to supplement the record settled by the parties based upon the statement of points relied on by appellant to include (1) the letter withdrawing the case, (2) the proceedings before the second court-martial, on double jeopardy set out in the appendix to the petition for rehearing, (3) the written brief of the prosecutor on double jeopardy and (4) the cablegram from the Fifteenth Army to the 76th Division. These were before the court below and support the inference that if the prosecutor had any evidence that the case was withdrawn by necessity he would have introduced evidence to prove it.

V.

The opinion and judgment of this Court, though tacitly approving, in fact disapproved *Cornero* v. *U. S.*, C. C. A. 9, 48 F. (2d) 69; *United States* v. *Shoemaker*, 27 Fed. Cas. 1067; *State* v. *Richardson*, 25 S. E. 220; *Allen* v. *State* (Fla.), 41 So. 593, and *Pizana* v. *State*, 20 Tex. Ct. App. 139, 54 Am. Rep. 511, and tacitly disapproved *United States* v. *Perez*, 22 U. S. 579; *United States* v. *Watson*, 28 Fed. Cas. 499 (No. 16,651); *Baker* v. *Commonwealth*, 290 Ky. 165, 132 S. W. (2d) 766; *State* v. *Grayson* (Fla.), 23 So. (2d) 484; and the opinion and judgment is in conflict with the following additional cases: *U. S.* v. *Kraut*, 2 F. Supp. 16; *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. (2d) 606.

The opinion in this case authorizes a mistrial to avoid the bar of double jeopardy upon grounds uncertain as to their scope or existence or their emergent nature.[1] We have found no authority to support it and earnestly urge that the court inadvertently overlooked the rationale of the cases above cited which is that before a mistrial can avoid the bar of double jeopardy a court must *judicially* determine in the presence of the defendant that the *trial* cannot be completed, due to uncontrollable and emergent circumstances and that the completion of a trial is not dependent upon the production of specified witnesses even though a case cannot be made without them.

---

[1] Thus the court states: "Instead it is *fairly* clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it *infeasible* to produce such persons before the court-martial at its then location. Distance of the persons from the then situs of the court was one element entering into the situation. *Perhaps* other essential elements entered in it. * * * it may be that *distance or emergencies* growing out of the prosecution of the war did not make it impossible or *infeasible* or *unreasonably difficult* to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. * * * he determined in the exercise of such discretion that the tactical situation made it *necessary or advisable* to withdraw the case. * * *." (Italics ours.)

VI.

The court overlooked the fact that the issue of imperious necessity was not before the second court-martial, and since it was not then raised, it should not have been considered by the court below or by this Court. The ultimate issue in this habeas corpus proceeding is whether the judgment of the court-martial is void. If void, petition must be discharged. Upon the court-martial record, it was clearly void since the only basis for denying the plea in bar of double jeopardy was that there had not been a finding by the first court-martial. Thus the discussion of imperious necessity in the opinion of Board of Review No. 4, based upon the unsworn, unsigned, ex parte indorsement made for the Commanding General, was dictum. In reality, there was only one question necessary to a decision on the petition for habeas corpus. Does jeopardy attach prior to a court-martial finding? This point was urged by petition under Point II, page 12 of the brief for appellee, but was not passed upon by the court. Perhaps the situation was not made clear in the transcript of record. It is made clear in the full record lodged with the court, a part of which appears in the appendix to this petition.

VII.

The opinion and the judgment of the court in holding that the Commanding General occupies a position analogous to the judge of a civil court overlooked the fact that he is no part of the court, would have no personal knowledge of the trial before the court or of the conditions confronting the court, which facts were pointed out on pages 6 to 8 of the supplemental brief for appellee.

VIII.

The opinion of the court insofar as it suggests emergencies, hazardous surroundings, and tactical situation intervening and developing after the trial, and the impossibility of producing the witnesses before the court-martial within a reasonable time indicate that the court gave credence or weight to the motion for reconsideration and the statements of the counsel for appellant who wrote his briefs on this appeal and argued the case to the court since those suggestions cannot be inferred either from the transcript of the record or the full record lodged with this Court. These statements of counsel are unsupported and unsupportable.

IX.

The court, in holding that the Commanding General exercised a "sound discretion" in determining that the case should be withdrawn because it could not be completed within a reasonable time, overlooked the fact, pointed out under Point II, page 10 of the brief of appellee, that the case necessarily could be completed in a shorter time than it would take to try the case anew. A majority of the witnesses who testified at the first trial, seven out of nine, were members of the 385th Infantry, 76th Division. They testified for petitioner. Can there be any question but that it would be easier and quicker to bring the three German witnesses to the first court-martial, regardless of the distance, than to try the entire case over again and send the seven members of the 76th Division the same distance to the situs of the second court-martial?

The withdrawal was not sensible under any theory or supposition of facts. It was obviously ill advised, unnecessary and unjust. No defense of it has ever been made by anyone who served in Germany.

X.

The opinion of the chief judge is manifestly correct and should become the opinion of this Court. It gives proper effect to the findings of fact of the court below, and to the applicable law, and to the supreme justice of the case.

WHEREFORE, by reason of the premises, petitioner prays for a rehearing upon the grounds aforesaid.

Respectfully submitted,

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,
N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,
Attorneys for Appellee.

Certificate of Counsel.

We hereby certify that the foregoing petition is filed in good faith and not for purposes of vexation or delay and is believed by us to be meritorious.

R. T. BREWSTER,
N. E. SNYDER.

APPENDIX.

1st IND.

Headquarters Fifteenth U. S. Army, APO 408, U. S. Army, 26 April 1945.

Referred for trial to Captain Milton J. Mehl, MAC, Headquarters Fifteenth U. S. Army, Trial Judge Advocate of general court-martial appointed by paragraph 1, Special Orders No. 81, Headquarters Fifteenth U. S. Army, 21 April 1945, as amended.

By Command of Lieutenant General Gerow:

(Signature) F. J. Heath,
F. J. Heath,
Major, AGD,
Asst. Adj. Gen.

Prosecution: Private First Class Wade, you are arraigned upon the charge here referred for trial, which I have just read, and I now ask you how you plead to the specification and charge but before receiving pleas to the general issue, however, I advise you that special pleas or motions, if any, should be made at this time.

Does the accused, Wade, have any special pleas or motions?

Defense: He does. He has a plea in bar of trial which he wishes to present to the court and in support of this plea in bar of trial, he offers in evidence as Defendant Wade's Exhibit "A", a duly authenticated record of trial by general court-martial appointed by the Commanding General, 76th Infantry Division. The trial was held at Pfalzfeld, Germany, on the 27th of March 1945.

Prosecution: No objection on the part of the prosecution to the admission of that record in evidence. In opposition to the motion on the plea in bar of trial, the prosecution would like to be heard at this time.

President: Subject to objection by any member of the court, the record of trial will be received in evidence. The court will not consider anything in the record that involves evidence but will only consider that part of the record that deals with the arraignment of the accused and the final action of the court.

There being no objection by any member of the court, the above-mentioned record of trial was received in evidence and marked as Defendant Wade's Exhibit "A".

President (to defense): Is that all you have to say? Have you any further remarks on this?

Defense: I would like to set out what the record shows. The record shows that the case against Private First Class Wade was tried; that after the prosecution and the defense rested, the court stated it wanted no further evidence, the prosecution stated it had no further evidence, the defense stated it had no further evidence and the court was closed. After deliberating on the case—and I state that when a court does deliberate on a case, it certainly places in jeopardy the man whose case is being deliberated on—the court reopened and requested the calling of certain other witnesses.

The case was continued for those witnesses and I maintain that that court and no other court has the right to sit in judgment upon the case against Pfc Wade. It would be a strange thing if other courts can sit in judgment on the case, not only would it violate the constitutional rights of Pfc Wade given to him by the Fifth Amendment against twice being placed in jeopardy for the same offense, not only does it violate the plain language of Article of War 40 but it violates every sense of justice and the due administration of justice because when you shift cases around, you allow time to lag, you allow witnesses to die in action and to disappear and you allow memory to fail. I say that not only on constitu-

tional and legal grounds but on common sense grounds, this case should be barred as the only court which has jurisdiction is the court of the 76th Division of which Pfc Wade was a member. I ask the court to consider those grounds.

Prosecution: The prosecution, in opposition thereto, would like to offer in evidence as Prosecution Exhibit "A", a letter of Headquarters 76th Infantry Division dated 3 April 1945.

Defense: That is objected to as being illegal and void.

Prosecution: May I ask the defense counsel to state why it is illegal and void as an item of evidence?

Defense: After a defendant has been placed in jeopardy, you cannot take that case away as an instrument for referring it to another court. I don't object to it because of the fact that it is not sworn but * * *

President: I wish you would be a little more specific. Your statements are too general for the court to get an idea of what your specific objection is. (To prosecution) This is a letter from whom that you are trying to offer in evidence?

Prosecution: The Commanding General, 76th Division addressed to the general court-martial which heard the case.

Defense: Withdrawing the charges.

President: Is it your contention that that is an illegal order?

Defense: Well, it is illegal as an instrument to bring it into any other court. That's what I mean. I'm not trying to be legalistic about it but I don't want it to appear that anybody can take cases from one court after it has deliberated and give them to some other court.

Prosecution: I think that is a matter for the court to determine. I think that unless the defense counsel has

some objection to it as a document, it should be admitted. As to the contents of it, he may make any statement he wishes to show that they are illegal, but unless he has some objection to it as a document, I think it should be admitted in evidence.

President: Did the court arrive at a finding as to guilty or not guilty in this case?

Defense: They did not.

President: Subject to objection by any member of the court, this letter will be admitted in evidence.

There being no objection by any member of the court, the above-mentioned letter was received in evidence and marked as Prosecution Exhibit "A".

Prosecution: Further, in opposition to this motion, the prosecution would like to submit a brief on the law of double jeopardy to the court, it being the contention of the prosecution that the accused in this case has not been tried under the 40th Article of War.

President: Has the defense seen this brief?

Defense: Yes, sir. I have.

President: You have had an opportunity to prepare any discussion you have on it?

Defense: It was handed to me this morning and I have read it and I will comment on it.

The trial judge advocate then handed several copies of the above-mentioned brief to the court, and, also, one to the defense counsel.

Prosecution: I would like to call the court's attention to Article of War 40 as cited in this brief, particularly those parts that are underlined—which is my underlining.

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which the accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

Argument one is that if the court shall be deemed not to have tried the accused after a finding of guilty as the article allows, certainly anything short of a finding shall not be considered a trial.

I won't read the entire brief because I think that is sufficiently clear, but I would like to call to the court's attention the paragraph on the second page of the brief from Winthrop, "Military Law and Precedents," 2nd Edition, 1920, pp. 262-263, which I will now read:

"Discontinuance before finding not equivalent to acquittal or amounting to jeopardy. It remains to notice the principle, applicable equally to civil and military cases, that where instead of a complete trial on the merits, the proceedings are discontinued by some interlocutory action, the accused, though not in fault, is not to be regarded as having been acquitted or put in jeopardy. Thus where an indictment has been duly abated by the entry of a *nolle prosequi*, or on a motion to quash, demurrer, or other proceedings; or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself; or where by reason of an irreconcilable difference of opinion among the jurors, the jury has been discharged—the defendant has not been legally 'tried' and cannot plead *autrefois acquit* upon a separate trial for the same offense. So, at military law, neither a mere arraignment, nor an arrest followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of charges after arraignment or pending the trial, nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding, nor a permanent interruption

of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution—will amount to an acquittal or a 'trial' of the accused."

I ask the court to find any clearer language to cover this case than that particular paragraph from Winthrop. The charges in this case were withdrawn from the court before a finding was ever reached and under all rules of military law, the accused has not been tried under the 40th Article of War unless a finding has been reached. I think the law cited in this brief will amply support my opposition to this motion.

Now, the defense counsel has made much of the fact that witnesses will die and members of the court will die and one thing or another. That has nothing to do with the double jeopardy. It so happened that a substantial period of time has elapsed here and undoubtedly people have died, including members of the court, but the main thing is whether or not this man has been tried and he has not been tried under the law that I have cited.

efense: Before going into the law, I want to point out that in the last paragraph before the conclusion of this brief the statement, "Both sides had rested, and the court at that time had continued the case for the purpose of securing more evidence, and never reached a finding," does not reflect the record. The record shows that the court was closed and reopened for further evidence. In other words, there were deliberations upon the innocense or guilt of the accused.

Now, as to the law: I searched what limited law there was in Bad Neuenhr and found no cases ruling this question. I think it is a brand-new question; that never before has it been presented or never before has it arisen.

The citation of Winthrop—which is the law the trial judge advocate is relying upon—on its face is inapplicable because of such statements as if the court cannot agree then there has been no trial and there

can be another trial. Now, as I understand military law, there is no such a thing as a hung jury as this author is apparently discussing. If the court cannot agree by that majority which the Articles of War require, then the accused must be discharged, so that he is citing an ancient and probably capable author, but he is not citing someone who understands military law as it now is administered. It is perfectly true that if there is a mistrial then double jeopardy does not apply, but absent a mistrial, then double jeopardy does apply. As soon as the court has been sworn to well and truly try the case upon the evidence, then, absent a mistrial, that court is the only court that can sit in judgment upon the accused in the particular case.

What is double jeopardy?-It is simply the proposition that the fathers who wrote the Constitution said that a man cannot be placed in jeopardy of life and limb twice for the same offense. That's what it is. I practiced law for some time in the Federal and state courts and I don't have access to those cases now, of course, but once a jury was sworn, absent a mistrial or absent a reversal on an appeal or something like that, that man could not be tried again. This case goes even further because the court sat and deliberated upon the innocence or guilt of the accused. True, under the court-martial manual, they had a perfect right to reopen the case for further evidence—that they could do—but only that court could listen to the evidence from those other witnesses.

Prosecution: The defense counsel states that state and Federal courts hold that once the jury is empanelled or the court sworn, as in this case, the man is put in jeopardy. I call the court's attention to the third paragraph of my brief where I state, citing Winthrop, "Military Law and Precedent," 2nd Edition, 1920, page 259, "that state courts on the subject of jeopardy are in variance, some holding that a prisoner is in 'jeopardy' when he has been put on his trial before

a jury duly empanelled and sworn. But the quotation from Winthrop, *supra*, it should be noted, states that the U. S. courts have held 'jeopardy' to mean tried, and courts-martial, so far as not otherwise prescribed in the Manual for courts-martial or by act of Congress, will apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States.'

I ask the court to notice the second paragraph of my brief where I cite Winthrop and briefly show to the court that former trial and jeopardy are not identical and a man is not tried until a finding is reached in U. S. courts and in military courts.

Defense: But I dare say that every case which Winthrop cites, and I found it time and time again to be true, are cases where there has been a mistrial such as it is found that the jury has been tampered with or the trial judge advocate makes prejudicial remarks or something like that. Those are the cases, and then some law writer tries to telescope all the law into a few sentences which I think, on its face, is absurd.

President: Anything further?

Prosecution: I will rest on Winthrop.

Defense: I will rest upon the Articles of War and the Constitution.

President: In discussing this case by the court, nothing in the record of the previous trial that involves evidence will be considered so the court will not be prejudiced should the motion be denied. Only that part of the record that deals with the arraignment of the accused and that part dealing with the final action of the court will be considered.

The court will be closed.

The court was closed at 1000 hours and reopened at 1010 hours, at which time all members of the court, the trial judge advocate, the defense counsel, the assistant defense counsel, the two accused, the German interpreter, and the reporter who were present at the close of the previous session in this case, resumed their seats.

President: The plea of the accused, Private First Class Wade, in bar of trial is denied.

FILED
SEP 27 1948
Robert B. Cartwright
CLERK

Order Denying Petition for Rehearing.

Fifteenth Day, September Term, Friday, October
A. D. 1948. Before Honorable Orie L. Phillips, Chief Ju
and Honorable Sam G. Bratton and Honorable Walter
Huxman, Circuit Judges.

This cause came on to be heard on the petition of appe
for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by
court that the said petition be and the same is hereby
nied, Honorable Orie L. Phillips, Chief Judge, dissenting

On October 19, 1948, an order of the United States Co
of Appeals was entered staying the mandate of the s
court for a period of thirty days from October 19, 1
under provision of paragraph 3 of rule 28 of said court.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Co
of Appeals for the Tenth Circuit, do hereby certify
foregoing as a full, true, and complete copy of the des
nated transcript of the record from the District Court
the United States for the District of Kansas, and full, t
and complete copies of certain pleadings, record ent
and proceedings, including the opinion (except full c
tions, titles and endorsements omitted in pursuance of
rules of the Supreme Court of the United States) had
filed in the United States Court of Appeals for the Te
Circuit in a certain cause in said United States Court
Appeals, No. 3575, wherein Walter A. Hunter, Ward
United States Penitentiary, Leavenworth, Kansas, was
pellant, and Frederick W. Wade was appellee, as full, t
and complete as the originals of the same remain on
and of record in my office.

In Testimony Whereof, I hereunto subscribe my na
and affix the seal of the United States Court of Appe
for the Tenth Circuit, at my office in Denver, Colorado,
27th day of October, A. D. 1948.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Co
of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(790)

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 427

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,

HARRY W. COLMERY,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

INDEX

Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit

Table of Cases

STATUTES

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Frederick W. Wade petitions the court for writ of certiorari to review the final judgment based on a majority opinion of the United States Court of Appeals for the Tenth Circuit, entered on September 7, 1948 (R. 107, *Hunter* v. *Wade*, 169 F. 2d 973), reversing the judgment of the United States District Court for the District of Kansas, discharging petitioner on a writ of habeas corpus (R. 26).

Three judges advocate who were members of a statutory Army Board of Review (R. 66-78), the trial court on

habeas corpus (R. 12-26, 72 F. Supp. 755), and the Chief Judge of the court below (R. 102-106, 169 F. 2d 976) held that the second trial by court-martial for the same offense did subject petitioner to double jeopardy in violation of the Fifth Amendment and hence the challenged sentence of the second court-martial was void for lack of jurisdiction to impose it.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The majority opinion of the court below (R. 97-102) determines issues of fact and law, relating to the question of imperious necessity, which did not arise in the court-martial trial which resulted in the denial of petitioner's plea of former jeopardy and his subsequent conviction (R. 119-127, 68-69, 60-62). It determines issues of fact and law on the issue of imperious necessity contrary to the findings of fact and conclusion of law made by the trial court (R. 12-26), and contrary to the dissenting opinion of the Chief Judge of the court below (R. 102-106) sustaining the trial court. Consequently the evidence must be stated with particularity.

This habeas corpus proceeding was initiated by petition to the United States District Court for the District of Kansas whereby petitioner sought discharge from the custody of respondent who held him under court-martial order, the validity of which petitioner attacked on the primary ground that he had been twice placed in jeopardy for the same offense in violation of the Fifth Amendment (R. 2-8, 8-10, 12-13, 33-39).

The proceeding came on for hearing September 28, 1946 (R. 33). The evidence disclosed that the following

proceedings had occurred, resulting in the court-martial order assailed as void.

Proceedings Before the Fifteenth Army General Court-Martial.

Petitioner, a combat member of the 385th Infantry, 76th Division, U. S. Army, was brought to trial before a Fifteenth Army general court-martial at Bad Neuenahr, Germany, on June 30, 1945, on a charge of raping a German woman (R. 66-67). He pleaded former jeopardy and introduced an authenticated record of trial for the same offense before a 76th Division general court-martial (R. 68). This record established that petitioner had been tried at Pfalzfeld, Germany, on March 27, 1945, that the prosecution introduced evidence and rested, that petitioner introduced evidence (the testimony of seven members of the 385th Infantry, 76th Division),[1] and rested, that the court stated it did not desire any witnesses called or recalled, that the case was submitted, that after deliberations, the court announced it desired to hear certain named German witnesses (residents of Krov, Germany), and continued the case until a date fixed by the Trial Judge Advocate (R. 68-69).

The prosecution opposed the plea of former jeopardy on the sole ground that the prior trial before the 76th Division court-martial did not constitute a trial causing jeopardy to attach,[2] and introduced a letter of withdrawal as prosecution Exhibit A (R. 68-69, 119-127). This letter did

---

[1]Respondent's Exhibit B, lodged with the court, contains the testimony of the seven members of the 385th Infantry, 76th Division at pages 229-266.

[2]The Trial Judge Advocate's written brief, filed with the court-martial, misstating the law of double jeopardy, appears at page 51 of respondent's Exhibit B.

not contain any reason for the withdrawal of the case and reads as follows:

PROSECUTION EXHIBIT A.

Headquarters 76th Infantry Division
APO 76, U. S. Army

3 April, 1945

201 — Wade Frederick W. (Enl)

Subject — withdrawal of charges

To — 1st Lt. John R. Sennott, Jr. Hq. 76th Inf. Div., T J A of G. C. M. Aptd, by Par. 2 SO 59, Hq. 76th Inf. Div. 23 Mar. '45

1. The charges in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf. are hereby withdrawn from the general court-martial appointed by Par. 2, SO 59, this Hq. 23 March, 1945, and no further proceedings will be taken by said court in connection therewith.

2. The charges and allied papers will be returned to this Hq.

By command of Major General Schmidt.

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

(Respondent's Exhibit B p. 200)

As thus submitted to it on the record of former trial, the letter of withdrawal and arguments and brief of counsel, the Fifteenth Army court-martial denied the plea of former jeopardy (R. 68-69). Petitioner thereupon pleaded not guilty, and upon conflicting evidence, three-fourths of the members concurring, the court-martial found petitioner guilty (R. 67-68). At this trial, as in the former trial,

members of the 385th Infantry testified for petitioner (R. 54-60). Petitioner was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life (R. 68).

Military Review.

Petitioner's case was reviewed pursuant to Articles of War 46, 10 U. S. C. A., Section 1517, and 50½, 10 U. S. C. A., Section 1522. The Fifteenth Army Staff Judge Advocate in an opinion recommended approval of the court-martial finding of guilty, but recommended the sentence be reduced to twenty years (R. 45-66). He contended that petitioner's plea in bar of trial had been properly overruled because the first trial had not been completed (R. 60-62). The Commanding General, Fifteenth Army, who had appointed the court-martial and had referred petitioner's case to it for trial, approved the finding of guilty but reduced the period of confinement to twenty years; and forwarded the record of trial to the Branch Office of the Judge Advocate General with the European theater for action (R. 68). In that office the case was assigned to Board of Review No. 4. In a unanimous opinion the Board held that petitioner's plea in bar should have been sustained and that the record of trial was legally insufficient to support the findings of guilty and sentence (R. 78, Par. 7). It held that the basis upon which the Fifteenth Army court-martial denied the plea in bar (that a soldier is not put in jeopardy until the court-martial trial is completed) was unsound, since jeopardy attaches under the Constitution of the United States prior to finding (R. 70-72, 76-78). This Board examined not only the record of trial upon which the Fifteenth Army court-martial denied the plea of former jeopardy, but it also examined and discussed the 4th and 5th indorsements to the

charge sheet by which the charges were in turn transmitted from the 76th Division to the Third Army, and from the Third Army to the Fifteenth Army (R. 69, 72-76). The meaning and effect of this 4th indorsement is now a material issue and is, therefore, set out.

AG 201-Wade, Frederick W (Enl) 4th Ind.
(19 Mar 45)

HQ 76TH INF DIV, APO 76, US Army, 3 Apr. 45.

TO: CG, Third US Army, APO 403, US Army.

1. The charges and allied papers in the case of *Pfc. Frederick W. Wade*, 39208980, Co. K, 385th Inf, are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case can not be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

3. The trial judge advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

(RESPONDENT'S EXHIBIT B, page 42.)

The Board of Review found that the reason assigned in this indorsement for the withdrawal of the case and its transfer to the Third Army for trial did not establish existence of an emergent situation justifying the termination of the first trial under the doctrine of imperious necessity, since it determined that the adjournment of the first trial, the letter of withdrawal and the 4th indorsement meant no more than that the first trial was terminated by reason of the absence of witnesses (R. 72-76).

The Assistant Judge Advocate General dissented, holding, in effect, that the 4th indorsement established that the charges against petitioner were withdrawn by reason of imperious necessity and that, therefore, petitioner did not have the right to plead former jeopardy at the second trial (R. 79-86). His contention was that while the termination of a criminal trial in a civil court by reason of absence of witnesses cannot justify a second trial, the termination of a court-martial trial by reason of the absence of witnesses does justify a second trial on the ground of imperious necessity (R. 79-86).

Thereupon, the Commanding General U. S. Forces, European theater, issued general court-martial order No. 2 confirming petitioner's sentence (R. 8-10).

Findings and Judgment of the Trial Court on Habeas Corpus.

The trial court had before it the complete court-martial records, the pertinent parts of which have been stated above. It also heard the testimony of petitioner that he was without knowledge that his case was being or had been withdrawn from the 76th. Division court-martial until he was charged before the Fifteenth Army court-martial

(R. 43). The trial court found in substance the following facts on the issue of imperious necessity:

1. The absence of witnesses, rather than an emergency due to the tactical situation, was the reason for the withdrawal of the case from the 76th Division court (R. 25).

2. The Commanding General 76th Division did not find that a military situation existed requiring discontinuance of the trial before the 76th Division court (R. 24).

3. The Commanding General, 76th Division, did not find that a military situation existed requiring him to transfer the cause to a jurisdiction where military conditions permitted the production of witnesses whom the court-martial requested the Trial Judge Advocate to procure (R. 24).

4. The tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25).

The trial court specifically found the facts to be as shown in the holding of Board of Review No. 4, and the statement of facts set out in this holding was specifically adopted by the parties (R. 13). On May 9, 1948, the trial court entered judgment discharging petitioner on bond (R. 26).

On June 12, 1947, respondent filed a motion for reconsideration, praying that the court reconsider its decision and fix a time and place whereat respondent might submit additional evidence in proof of the facts alleged in the motion (R. 26-30). On July 10, 1947, the court denied this motion for want of jurisdiction (R. 31).

Proceedings in Court Below.

Respondent appealed from the judgment of the trial court, relying upon three points: the first, that peti-

tioner was not placed in double jeopardy in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat situation of the United States in a state of war prevented its completion; second, that the court-martial, by which petitioner was convicted, did not lack jurisdiction though the identical charge and specification had been previously submitted to another court-martial for trial and had been partially tried, but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United States in a state of war; and third, that the trial court erred in overruling the motion for reconsideration (R. I).

The court below (the Chief Judge dissenting), in effect, set aside the findings of the trial court and made the following findings upon which it based its decision and judgment of reversal:

1. The absence of witnesses was not the sole cause for the withdrawal of the case from the 76th Division court-martial (R. 101).

2. It is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

3. The Commanding General 76th Division determined in the exercise of his sound discretion that the tactical situation made it necessary or advisable to withdraw the case from the 76th Division court-martial and to refer it to the Commanding General, Third Army, for trial before another court-martial (R. 101-102).

On September 7, 1948, it entered its judgment reversing the judgment of the trial court and remanding the cause

with directions to enter judgment denying the petition for the writ of habeas corpus, and remanding petitioner to the custody of respondent (R. 107). The Chief Judge of the court below, in his dissent, followed the trial court and determined that the sole reason for termination of the first trial was the inability of the prosecution to produce conveniently the absent witnesses and not because of the tactical situation or for any other reason which would justify application of the doctrine of imperious necessity (R. 103).

On September 27, 1948, petitioner filed his petition for rehearing in the court below (R. 109-127). On October 8, 1948, the court below denied the petition for rehearing, Honorable Orie L. Phillips, Chief Judge, dissenting (R. 128).

There is a total absence of proof of any character that the tactical situation or combat conditions prevented the completion of the trial before the 76th Division court-martial (R. 1-128).

There are statements in the record asserting such a contention. They were made by the Assistant Judge Advocate General on review (R. 85-86), and by counsel for petitioner (1) at the habeas corpus hearing in the trial court (R. 39-40), (2) in the motion for reconsideration filed in the trial court (R. 26-30), and (3) in the statement of points relied upon by appellant (R. 1). But the record is barren of any evidence to sustain such statements.

II.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(a) Statutory Provision Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, Act of June 25, 1948, Chapter 646, Public Law 773, 62 Stat. ____.

(b) Date of the Judgment to Be Reviewed.

The judgment of the Court of Appeals for the Tenth Circuit reversing the judgment of the District Court discharging petitioner was entered on September 7, 1948 (R. 107). Petitioner filed his petition for rehearing on September 27, 1948 (R. 127). It was denied on October 8, 1948 (R. 128). The issuance of the mandate has been stayed pending this application for review (R. 128). This petition and the certified record are filed within ninety days from the date of the judgment sought to be reviewed (Title 28, United States Code, Section 2101, Act of June 25, 1948, Chapter 646, Public Law 773, 62 Stat. ____).

(c) Statement of Nature of the Case and Ruling of the Court of Appeals.

This is a habeas corpus case instituted by petitioner in the United States District Court to obtain release from the custody of respondent who held petitioner by color of a United States general court-martial order, confirming a court-martial conviction and sentence (R. 2-10).

The trial court discharged petitioner upon the ground his detention violated the Fifth Amendment of the Constitution in that petitioner had been twice tried for the

The majority of the Court of Appeals ruled that, although he had been twice tried for the same offense, petitioner was not subjected to double jeopardy in violation of the Fifth Amendment. It reversed the judgment of the trial court with directions to deny the writ of habeas corpus and remand petitioner to the custody of respondent (R. 97-102). The Chief Judge dissented (R. 102-106).

(d) Cases Believed to Sustain the Jurisdiction of This Court.

This court has assumed jurisdiction by certiorari to Courts of Appeals in recent habeas corpus cases, viz.:

Price v. *Johnston*, 334 U. S. 266, 92 L. Ed. 993.

Hunter v. *Martin*, 334 U. S. 302, 92 L. Ed. 1012.

III.

THE QUESTIONS PRESENTED.

(a) Does the judgment of the court below erroneously deny petitioner the protection of the Fifth Amendment of the Constitution?

(b) Does the judgment of the court below erroneously apply the doctrine of imperious necessity?

(c) Does the Commanding General, empowered to appoint a court-martial and to refer cases to it for trial, although not a part of the court, have the power, independent of the court, to withdraw a case from it on the ground of imperious necessity after jeopardy has attached and cause the accused to be tried anew without his consent without violating the Fifth Amendment of the Constitution?

(d) Can the existence of imperious necessity for the termination of a trial be established, so as to validate a

judgment rendered in a subsequent trial after denial of the plea of former jeopardy upon an erroneous theory and without any proof of imperious necessity, merely upon a showing that on the date the case was withdrawn from the court-martial who first heard it, the charges were transmitted from the 76th Division (whose commander appointed the first court-martial) to the Third Army with an indorsement signed by the Adjutant General for the Commanding General that the case was previously referred for trial by general court-martial and trial commenced, that the court continued the case for testimony of witnesses unavailable due to sickness, that due to the tactical situation, the distance to the residence of these witnesses had become so great that the case could not be completed within a reasonable time?

(e) Does the court below, an appellate court, have the right to reverse outright the judgment of the trial court, upon determination of issues of fact and law not presented to the trial court and not presented by appellant on appeal, namely, that the Commanding General determined that it was necessary or advisable to withdraw the case from the first court-martial, that he did this in the exercise of a sound discretion vesting in him, that such determination was sufficient to justify the subsequent trial without subjecting petitioner to double jeopardy in violation of the constitution?

(f) Did the court below err in setting aside findings of fact made by the trial court, based upon substantial evidence, which findings are not erroneous, and which, in any event, are not clearly erroneous?

(g) Does the judgment of the court below violate petitioner's right to have the validity of his conviction appraised upon consideration of the case as it was tried and as the issue of former jeopardy was determined by the trial court?

be reviewed and determined by this court, as provided by the statutes of the United States; and that the judgment of said Court of Appeals be reversed by the court, and your petitioner prays that the certified copy of the record and proceedings of said court, filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

Frederick W. Wade,
Petitioner.

R. T. Brewster,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. Snyder,
210 Brotherhood Block,
Kansas City, Kansas,

Harry W. Colmery,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

sel, the Fifteenth Army court-martial denied the plea of former jeopardy (R. 68-69, 119-127). Petitioner thereupon pleaded not guilty, and upon conflicting evidence, three-fourths of the members concurring, the court-martial found petitioner guilty (R. 67-68). At this trial, as in the former trial, members of the 385th Infantry testified for petitioner (R. 54-60). Petitioner was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life (R. 68).

Military Review.

Petitioner's case was reviewed pursuant to Articles of War 46, 10 U. S. C. A., Section 1517, and 50½, 10 U. S. C. A., Section 1522. The Fifteenth Army Staff Judge Advocate in an opinion recommended approval of the court-martial finding of guilty, but recommended the sentence be reduced to twenty years (R. 45-66). He contended that petitioner's plea in bar of trial had been properly overruled because the first trial had not been completed (R. 60-62). The Commanding General, Fifteenth Army, who had appointed the court-martial and had referred petitioner's case to it for trial, approved the finding of guilty but reduced the period of confinement to twenty years; and forwarded the record of trial to the Branch Office of the Judge Advocate General with the European theater for action (R. 68). In that office the case was assigned to Board of Review No. 4. In a unanimous opinion the Board held that petitioner's plea in bar should have been sustained and that the record of trial was legally insufficient to support the findings of guilty and sentence (R. 78, Par. 7). It held that the basis upon which the Fifteenth Army court-martial denied the plea in bar (that a soldier is not put in jeopardy until the court-martial trial is completed) was unsound, since jeopardy attaches

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The decision of the court below, in holding that the second trial did not subject petitioner to double jeopardy in violation of the Fifth Amendment of the Constitution has decided a federal question in a way probably in conflict with applicable decisions of this court, viz.: *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118; *United States* v. *Perez*, 22 U. S. (9 Wheaton) 579, 6 L. Ed. 165; and has rendered a decision in conflict with a decision of another Court of Appeals, viz.: *Cornero* v. *United States*, (9th Circuit) 48 F. 2d 69, and has rendered a decision in conflict with other federal and state decisions on the same matter, viz.:

United States v. *Kraut*, 2 F. Supp. 16.
United States v. *Shoemaker*, 27 Fed. Cas. (No. 16279) 1067.
United States v. *Watson*, 28 Fed. Cas. (No. 16651) 499.
State v. *Richardson*, 47 S. Car. 166, 25 S. E. 220.
Allen v. *State*, 52 Fla. 1, 41 So. 593.
Pizano v. *State*, 20 Tex. App. 139, 54 Am. Rep. 511.
Baker v. *Commonwealth*, 280 Ky. 465, 132 S. W. 2d 766.
State v. *Grayson*, 156 Fla. 435, 23 So. 2d 484.
Mullins v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606.
State v. *Little*, 120 W. Va. 213, 197 S. E. 626.
See also dissenting opinion below of Phillips, Chief Judge (R. 102).

(b) The decision of the court below, in holding that the Commanding General, although not a part of a court-martial, has the power to determine, *ex parte*, independ-

ently of the court, when cases may be withdrawn from a court-martial without hazarding the defense of former jeopardy, has decided an important question of federal law which has not been but should be settled by this court.

(c) The decision of the court below emasculates the constitutional prohibition against double jeopardy and destroys this safeguard against the conviction of innocent persons and, unless reviewed, petitioner will be without remedy to avoid a grave miscarriage of justice.

(d) The court below, in setting aside the findings of the trial court, in making findings of fact upon speculative possibilities and suppositions unsupported by the record, based upon an unsworn, hearsay, *ex parte* communication of unknown authorship (the 4th indorsement) and in ruling the case on a different factual and legal basis than that upon which respondent prosecuted his appeal, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(e) The decision of the court below, in determining the validity of petitioner's conviction by invoking and applying the doctrine of imperious necessity to the issue of double jeopardy although the court-martial which tried petitioner a second time did not consider this doctrine in ruling the issue of former jeopardy, is probably in conflict with the decision of this court, viz.: *Cole* v. *Arkansas*, 332 U. S. 834, 92 L. Ed. 429, and constitutes a denial of due process of law.

under the Constitution of the United States prior to finding (R. 70-72, 76-78). This Board examined not only the record of trial upon which the Fifteenth Army court-martial denied the plea of former jeopardy, but it also examined and discussed the 4th and 5th indorsements to the charge sheet (not introduced in evidence before the Fifteenth Army court-martial) by which the charges were in turn transmitted from the 76th Division to the Third Army, and from the Third Army to the Fifteenth Army (R. 69, 72-76). The meaning and effect of this 4th indorsement is now a material issue and is, therefore, set out.

AG 201-Wade, Frederick W (Enl) 4th Ind.[1]

(19 Mar 45)

HQ 76TH INF DIV, APO 76, US Army, 3 Apr. 45.

TO: CG, Third US Army, APO 403, US Army.

1. The charges and allied papers in the case of *Pfc. Frederick W. Wade*, 39208980, Co. K, 385th Inf, are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness; and the court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case can not be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

---

[1]This document is paraphrased in the Board of Review opinion (R. 69). Omitting caption and signature, it is set out in the District Court opinion (R. 16, footnote). It appears at page 42, Respondent's Exhibit B, lodged with this court.

CONCLUSION.

Each of the questions presented is of grave public importance. The majority ruling directly affects the cause of human freedom under the Constitution of the United States. Unless the majority ruling below is reviewed, the law of double jeopardy will be left in confusion; and petitioner will be the victim of a new determination of facts in the appellate court without an opportunity to refute them.

The controlling facts were set out in the opinion of the Board of Review (R. 66), were adopted by the parties as an agreed statement of facts; and the trial court specifically found the facts to be as shown in the holding of the Board of Review (R. 13). The court below, however, disregarded these facts (R. 97) in derogation of accepted appellate practice, as expressed in Rule 52 (a); Federal Rule of Civil Procedure, 28 U. S. C. A. foll. Sec. 723 c.

The controlling decisions of this and other courts are aptly set out in the opinion of the Board of Review (R. 66), in the opinion of the trial court (R. 12) and in the dissenting opinion of the Chief Judge of the court below (R. 102).

Two additional points have arisen from the ruling of the court below which involve due process of law. The first trial in which petitioner was put in jeopardy was not terminated by the court-martial conducting the trial (R. 68). It was terminated by extra-judicial action, purportedly taken on behalf of the Commanding General without notice to petitioner and without his knowledge or consent and without an opportunity to be heard on that vital question (R. 68-69, 43). The Commanding General is a representative of the prosecution. He is not a part of the

court-martial. He is without power or discretion to terminate a case after jeopardy has attached without hazarding the constitutional defense of former jeopardy. The second point is that petitioner was convicted by the second court-martial upon the erroneous theory that it had jurisdiction because the first trial was terminated prior to final disposition of the case (R. 68, 60-62, 119-127) and now the court below has held that the second court-martial had jurisdiction upon the new theory that the Commanding General had the power to terminate the first trial without barring a second trial, if, in his discretion, he found it necessary or advisable to do so, and that he apparently did so find (R. 100-102). Had the prosecution taken this position in the second court-martial trial or had the respondent taken this position in the trial court, petitioner would have been afforded an opportunity to be heard and to introduce evidence upon these issues, establishing the true factual situation. Petitioner has been denied the presumption of acquittal in his first court-martial trial upon issues upon which he has had no chance to be heard. Petitioner has been denied safeguards guaranteed by due process of law. *Cole v. Arkansas*, 332 U. S. 834, 92 L. Ed. 429.

Such facts and controlling decisions make readily apparent the importance and necessity for granting the writ, and counsel for petitioner feel that further elaboration of them in a brief in support of this petition would be superfluous.

Wherefore petitioner prays that a writ of certiorari issue to the Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals, in the case numbered and entitled No. 3575, *Walter A. Hunter, Appellant*, v. *Frederick W. Wade, Appellee*, to the end that this cause may

States in a state of war; and third, that the trial court erred in overruling the motion for reconsideration (R. 1).

The court below (the Chief Judge dissenting), in effect, set aside the findings of the trial court and made the following findings upon which it based its decision and judgment of reversal:

1. The absence of witnesses was not the sole cause for the withdrawal of the case from the 76th Division court-martial (R. 101).

2. It is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

3. The Commanding General 76th Division determined in the exercise of his sound discretion that the tactical situation made it necessary or advisable to withdraw the case from the 76th Division court-martial and to refer it to the Commanding General, Third Army, for trial before another court-martial (R. 101-102).

On September 7, 1948, it entered its judgment reversing the judgment of the trial court and remanding the cause with directions to enter judgment denying the petition for the writ of habeas corpus, and remanding petitioner to the custody of respondent (R. 107). The Chief Judge of the court below, in his dissent, followed the trial court and determined that the sole reason for termination of the first trial was the inability of the prosecution to produce conveniently the absent witnesses and not because of the tactical situation or for any other reason which would justify application of the doctrine of imperious necessity (R. 103).

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 12 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF FOR PETITIONER.

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,

HARRY W. COLMERY,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

INDEX

Brief for Petitioner

Table of Cases

CONSTITUTION

STATUTES

16, 19

2

U.

18, 27

19

20

20

20

23

23

15

20, 23

20

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF FOR PETITIONER.

I.

OPINIONS BELOW.

The majority opinion of the United States Court of Appeals for the Tenth Circuit (R. 97-102) reversing the judgment of the United States District Court for the District of Kansas is reported at 169 F. 2d 973.

The dissenting opinion of the Chief Judge (R. 102-106) is reported at 169 F. 2d 976.

The opinion of the District Court ordering petitioner discharged from the custody of respondent (R. 12-26) is reported at 72 F. Supp. 755. The oral opinion of the District Court on respondent's motion for reconsideration (R. 92-95) is not reported.

The opinion of Board of Review No. 4, Branch Office of Judge Advocate General, holding the record legally insufficient to support the court-martial judgment against petitioner (R. 66-78) and the opinion of the Assistant Judge Advocate General, dissenting therefrom (R. 78-87) are not reported.

The opinions of the staff judges advocate, Fifteenth Army, recommending that the court-martial judgment be modified and approved (R. 45-66) are not reported.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, Act of June 25, 1948, Ch. 646, Public Law 773, 62 Stat. ____. The judgment of the Court of Appeals was entered September 7, 1948 (R. 107). Petition for rehearing was denied October 8, 1948 (R. 128). The mandate was stayed (R. 128). The petition for a writ of certiorari was filed November 18, 1948. This court granted the writ January 10, 1949, 69 S. Ct. 412.

III.

STATEMENT OF THE CASE.

A.

Habeas Corpus Hearing in Trial Court.

This habeas corpus proceeding was initiated by petition to the United States District Court for the District of

Kansas whereby petitioner sought discharge from the custody of respondent who held him under court-martial order, the validity of which petitioner attacked on the primary ground that he had been twice placed in jeopardy for the same offense in violation of the Fifth Amendment (R. 2-8, 8-10, 12-13, 33-39).

The proceeding came on for hearing September 28, 1946 (R. 33). At the close of the hearing, there was no controversy between the parties as to the facts. Each specifically adopted the statement of facts (R. 68-70, Par. 4) set out in the holding of Board of Review No. 4 of the Branch Office of the Judge Advocate General with the European Theater (R. 13). However, thirty-four days after judgment, respondent, by motion, prayed that the court reconsider its decision and reopen the case for the introduction of additional evidence (R. 26, 26-30). Moreover, the statement of points relied upon by respondent in his appeal to the court below (Points 1 and 2) contains the *assertion* that the tactical situation prevented the completion of petitioner's first trial (R. 1). This assertion is not supported by the statement of facts (R. 68-70, Par. 4) set out in the holding of the Board of Review (R. 66-78). It is not supported by the evidence before the 76th Division Court-martial which first tried petitioner (R. 69). It is not supported by the evidence before the Fifteenth Army court-martial which overruled the plea of former jeopardy and convicted petitioner (R. 68-69, 119-127). It is not supported by the record before the Branch Office of the Judge Advocate General with the European Theater which reviewed the conviction (R. 66-87). It is not supported by the record made at the hearing on the habeas corpus petition (R. 2-96).

The record made at the habeas corpus hearing on September 28, 1946, disclosed that the following proceedings

had occurred resulting in the court-martial order assailed as void.

Proceedings Before the Fifteenth Army General Court-Martial.

Petitioner, a combat member of the 385th Infantry, 76th Division, U. S. Army, was brought to trial before a Fifteenth Army general court-martial at Bad Neuenahr, Germany, on June 30, 1945, on a charge of raping a German woman (R. 66-67). He pleaded former jeopardy and introduced an authenticated record of trial for the same offense before a 76th Division general court-martial (R. 68). This record established that petitioner had been tried at Pfalzfeld, Germany, on March 27, 1945, that the prosecution introduced evidence and rested, that petitioner introduced evidence (the testimony of seven members of the 385th Infantry, 76th Division[1]), and rested, that the court stated it did not desire any witnesses called or recalled, that the case was submitted, that after deliberations, the court announced it desired to hear certain named German witnesses (residents of Krov, Germany), and continued the case until a date to be fixed by the Trial Judge Advocate (R. 68-69).

The prosecution opposed the plea of former jeopardy on the sole ground that the prior trial before the 76th Division court-martial did not constitute a trial causing jeopardy to attach,[2] and introduced a letter of withdrawal as prosecution Exhibit A (R. 68-69, 119-127). This letter did

---

[1]Respondent's Exhibit B, lodged with this court, contains the testimony of the seven members of the 385th Infantry, 76th Division at pages 229-226.

[2]The Trial Judge Advocate's written brief, filed with the court-martial, misstating the law of double jeopardy, appears at page 51 of respondent's Exhibit B, lodged with this court.

not contain any reason for the withdrawal of the case and reads as follows:

PROSECUTION EXHIBIT A.[1]

Headquarters 76th Infantry Division
APO 76, U. S. Army

3 April, 1945

201 — Wade Frederick W. (Enl)

Subject — withdrawal of charges

To — 1st Lt. John R. Sennott, Jr. Hq. 76th Inf. Div., T J A of G. C. M. Aptd, by Par. 2 SO 59, Hq. 76th Inf. Div. 23 Mar. '45

1. The charges in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf. are hereby withdrawn from the general court-martial appointed by Par. 2, SO 59, this Hq. 23 March, 1945, and no further proceedings will be taken by said court in connection therewith.

2. The charges and allied papers will be returned to this Hq.

By command of Major General Schmidt.

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

As thus submitted to it on the record of former trial, the letter of withdrawal and arguments and brief of coun-

[1]This exhibit is not set out in full in the record. It appears at page 200 of respondent's Exhibit B, lodged with this Court. Its content and the fact it was the only evidence offered by the prosecution in opposition to the plea of former jeopardy is disclosed in the Board of Review opinion (R. 68-69).

3. The trial judge advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

The Board of Review found that the reason assigned in this indorsement for the withdrawal of the case and its transfer to the Third Army for trial did not establish existence of an emergent situation justifying the termination of the first trial under the doctrine of imperious necessity, since it determined that the adjournment of the first trial, the letter of withdrawal and the 4th indorsement meant no more than that the first trial was terminated by reason of the absence of witnesses (R. 72-76).

The Assistant Judge Advocate General dissented, holding, in effect, that the 4th indorsement established that the charges against petitioner were withdrawn by reason of imperious necessity and that, therefore, petitioner did not have the right to plead former jeopardy at the second trial (R. 79-86). His contention was that while the termination of a criminal trial in a civil court by reason of absence of witnesses cannot justify a second trial, the termination of a court-martial trial by reason of the absence of witnesses does justify a second trial on the ground of imperious necessity (R. 79-86).

Thereupon, the Commanding General U. S. Forces, European theater, issued general court-martial order No. 2 confirming petitioner's sentence (R. 8-10).

The trial court had before it the complete court-martial records[1] made before the 76th Division Court-martial, before the Fifteenth Army Court-martial, and on review of the Fifteenth Army Court-martial judgment, the pertinent parts of which have been stated above. It also heard the testimony of petitioner that he was without knowledge that his case was being or had been withdrawn from the 76th Division court-martial until he was charged before the Fifteenth Army court-martial (R. 43). It had before it the statement of facts (R. 68-70, Par. 4) set out in the holding of the Board of Review (R. 66-78), specifically adopted by the parties (R. 13).

B:

Findings and Judgment of the Trial Court on Habeas Corpus.

The trial court found in substance the following facts on the issue of imperious necessity:

1. The absence of witnesses, rather than an emergency due to the tactical situation, was the reason for the withdrawal of the case from the 76th Division court (R. 25).

2. The Commanding General 76th Division did not find that a military situation existed requiring discontinuance of the trial before the 76th Division court (R. 24).

3. The Commanding General, 76th Division, did not find that a military situation existed requiring him to transfer the cause to a jurisdiction where military conditions permitted the production of witnesses whom the court-martial requested the Trial Judge Advocate to procure (R. 24).

---

[1]Respondent's Exhibit B, lodged with this court.

4. The tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25).

The trial court specifically found the facts to be as shown in the holding of Board of Review No. 4, and the statement of facts set out in this holding was specifically adopted by the parties (R. 13). On May 9, 1947, the trial court entered judgment discharging petitioner on bond (R. 26).

C.

Motion for Reconsideration in Trial Court.

On June 12, 1947, respondent filed a motion for reconsideration, praying that the court reconsider its decision and fix a time and place whereat respondent might submit additional evidence in proof of the facts alleged in the motion (R. 26-30). On July 10, 1947, the court denied this motion for want of jurisdiction (R. 31).

D.

Proceedings in Court Below.

Respondent appealed from the judgment of the trial court, relying upon three points: the first, that petitioner was not placed in double jeopardy in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat situation of the United States in a state of war prevented its completion; second, that the court-martial, by which petitioner was convicted, did not lack jurisdiction though the identical charge and specification had been previously submitted to another court-martial for trial and had been partially tried, but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United

On September 27, 1948, petitioner filed his petition for rehearing in the court below (R. 109-127). On October 8, 1948, the court below denied the petition for rehearing, Honorable Orie L. Phillips, Chief Judge, dissenting (R. 128).

E.

Statement of Lack of Evidence.

There is a total absence of proof of any character that the tactical situation or combat conditions prevented the completion of the trial before the 76th Division court-martial (R. 1-128). There are statements in the record asserting such a contention. They were made by the Assistant Judge Advocate General on review (R. 85-86); and by counsel for petitioner (1) at the habeas corpus hearing in the trial court (R. 39-40); (2) in the motion for reconsideration filed in the trial court (R. 26-30), and (3) in the statement of points relied upon by appellant (R. 1). But the record is barren of any evidence to sustain such statements.

The 76th Division court-martial did not terminate the trial of petitioner's case. The case was withdrawn without any action being taken by that court (R. 68-69).

The Fifteenth Army court-martial did not deny petitioner's plea of former jeopardy on the ground of imperious necessity. No issue was raised, no proof was introduced on that ground in that court (R. 68-69).

IV.

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED.

A.

The court below erroneously applied the doctrine of imperious necessity to a situation in which witnesses be-

come unavailable so as to violate petitioner's constitutional right not to be twice put in jeopardy for the same offense.

B.

The court below erred in holding that the Commanding General who appointed the 76th Division court-martial had the power independent of the court, and without the knowledge or consent of petitioner, to determine that imperious necessity existed for the withdrawal of petitioner's case from the court-martial so as to preclude the defense of former jeopardy at a subsequent trial.

C.

The court below erred in holding that the action of the Commanding General in withdrawing petitioner's case from the 76th Division court-martial after jeopardy had attached was based on grounds of imperious necessity, was in the exercise of a sound discretion, and avoided the protection against double jeopardy afforded petitioner by the Fifth Amendment.

D.

The court below erred in setting aside the findings of fact made by the trial court and making new findings of fact for the following reasons:

1. The trial court's findings are supported by the facts adopted by the parties;

2. The trial court's findings are based upon substantial evidence, are not erroneous, and certainly are not clearly erroneous;

3. The findings of the court below are in conflict with the facts adopted by the parties and are in conflict with the facts found by the trial court;

4. The findings of the court below are not supported by any evidence and are contrary to the evidence.

E.

The judgment of the court below denies to petitioner due process of law in that it determines the validity of his conviction by court-martial upon the issue of imperious necessity not considered or determined by the court-martial and it determines the validity of the judgment of the trial court upon new issues of imperious necessity not considered or determined by the trial court and not raised on appeal; thereby denying to petitioner the fundamental right to know in advance what he is called upon to defend against so that he can produce evidence and be heard upon the issues to be decided.

F.

The court below erred in taking judicial notice that the armed forces of the United States engaged in the prosecution of the war in the European Theater were moving rapidly and that conditions in the field were more or less fluid; in deducing therefrom that it may have been that it was wholly infeasible, if not impossible, to produce the witnesses desired by the court-martial before the court at its location at the time of withdrawal of the charges, and in drawing from these assumptions the further assumption that the Commanding General determined that the tactical situation made it necessary or advisable to withdraw the case.

V.

SUMMARY OF THE ARGUMENT.

Because of the prohibition of the Fifth Amendment, the Fifteenth Army Court-Martial was without jurisdiction

to try petitioner and convict him for the identical offense for which he had been in jeopardy before the 76th Division Court-Martial from which the charges were withdrawn without petitioner's knowledge or consent; hence the sentence of the Fifteenth Army Court-Martial is void, and habeas corpus is available to petitioner to obtain his release from the custody of respondent who held him by reason of that void sentence. *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118; *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461.

Three judges advocate who were members of a statutory Army Board of Review (pursuant to Article of War 50½, 10 U. S. C. A., Sec. 1522) held that petitioner had twice been put in jeopardy in violation of the Fifth Amendment of the Constitution (R. 66-78). The trial court so held and ordered his release on habeas corpus (R. 12-26, *Wade* v. *Hunter*, 72 F. Supp. 755). The Chief Judge of the court below so held, in his dissenting opinion (R. 102-106, *Hunter* v. *Wade*, 169 F. 2d 973, 976).

The majority opinion of the court below recognizes that the constitutional guaranty of the Fifth Amendment protects an accused against a second trial, that violation of this guaranty deprives the court of jurisdiction to try the accused, and that a federal court has jurisdiction in habeas corpus to determine whether the sentence of the court-martial was void for the reason that petitioner was twice placed in jeopardy for a single offense, and if so to order his discharge (R. 99-100), *Hunter* v. *Wade*, 169 F. 2d 973, 975.

The sole ultimate question in this case, as raised by respondent in his appeal (R. 1) and by the majority opinion of the court below is whether the withdrawal of the case from the 76th Division Court-Martial can be justified under the doctrine of "imperious" necessity, and thus preclude a

plea of former jeopardy and consequent lack of jurisdiction of the second court-martial.

Petitioner presents his argument upon this question under four points, here summarized.

A.

Assuming the withdrawal of the charges from the first court-martial to have been based upon the infeasibility or impossibility of producing absent witnesses before the 76th Division Court-Martial growing out of the tactical situation intervening and developing after the court reopened and continued the case for the purpose of securing the attendance of additional witnesses—as found by the Court of Appeals—such a situation did not justify the withdrawal upon the ground of imperious necessity. Fifth Amendment to Constitution; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165; *Cornero* v. *U. S.*, (Ninth Circuit) 48 F. 2d 69; and other cases cited under this point.

B.

The Commanding General was without the power or discretion, independent of the court and without the knowledge or consent of petitioner, to determine the existence of imperious necessity for the withdrawal of petitioner's case from the 76th Division Court-Martial.

A trial court-martial has the power, in the proper exercise of its sound judicial discretion, to terminate a trial upon grounds of imperious necessity. But the Commanding General cannot preempt this power, since he is not a part of the court-martial and cannot usurp its judicial functions. He may withdraw charges but after jeopardy has attached, he cannot by the use of this administrative prerogative place an accused in jeopardy a second time for the same offense. Not even a trial court has the right

to terminate a trial on the ground of imperious necessity in *ex parte* proceedings.

C.

Assuming but not conceding the power of the Court of Appeals to make new findings of fact upon the record presented to it, the findings it did make as to the cause of the withdrawal of the case are clearly erroneous. They purport to be based on a communication, the 4th indorsement (whereby the charges and allied papers in petitioner's case were transmitted to the Commanding General, Third Army), which communication is an unsworn, *ex parte*, hearsay document, not introduced into evidence in the trial before the Fifteenth Army Court-Martial; and on judicial notice. The statements in the communication and the matters of history of which the Court of Appeals took judicial notice do not support the conclusion drawn therefrom that the Commanding General determined it was necessary or advisable for him to withdraw the case because of a tactical situation which intervened to make infeasible or impossible the production of certain witnesses before the court-martial. The record is barren of any evidence that it was either necessary or advisable to withdraw the case or that the Commanding General so determined. The contrary clearly appears from the record. The court below acknowledges that its findings as to the cause for the withdrawal of the case (which it somehow concludes were also made by the Commanding General) may be wrong, as indicated by the statement in the majority opinion:

> "It may be that the case should have remained with the Court instead of being withdrawn" (R. 101, 169 F. 2d 973-976).

The findings of the trial court on the other hand are based upon substantial evidence and are clearly correct.

They are based upon the facts stipulated by the parties (R. 13). Unless these findings are clearly erroneous they cannot be set aside (Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A., foll. 723(c)).

D.

The validity of the court-martial sentence must be appraised upon the issues considered and determined by the Fifteenth Army Court-Martial. The issue of imperious necessity was not considered or determined by that court. The holding of the Court of Appeals that the issue of imperious necessity was determined by the Commanding General denies to petitioner due process of law since he had no notice or opportunity to contest this issue.

The validity of the judgment of the trial court on habeas corpus must be appraised upon the issues considered and determined by that court. The Court of Appeals originally raised and decided the issue that the Commanding General determined in the exercise of a sound discretion that it was necessary or advisable to withdraw the case from the 76th Division Court-Martial, it was not considered or determined by that court. It was not raised by respondent on appeal. Thus, the holding of the Court of Appeals on this issue denies to petitioner due process of law since he had no notice or opportunity to contest this issue. *Cole v. Arkansas*, 332 U. S. 834, 92 L. Ed. 429.

VI.

ARGUMENT.

A.

Infeasibility or impossibility of producing absent witnesses before the court arising after jeopardy attached would not justify the withdrawal of charges against peti-

tioner so as to preclude the defense of former jeopardy guaranteed by the Fifth Amendment. Whatever the underlying cause, the absence of witnesses is not ground for the termination of a trial so as to sanction a second prosecution for the same offense. It is not a sudden, uncontrollable or unforeseeable emergency requiring termination of the trial, and a second trial in the interest of public justice.

For the purpose of this argument we assume the propriety of the factual determinations of the court below and assume that the withdrawal of the case from the court-martial is analogous to action of a presiding judge in the presence of the accused of declaring a mistrial in a criminal case in a civil court.

The double jeopardy clause of the Fifth Amendment reads:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

This constitutional provision is one of many contained in the Bill of Rights, designed to protect persons accused of crime against the dreadful circumstance of being convicted of crimes which they did not commit. It is a safeguard against conviction and punishment of innocent persons. It is abhorrent to the sense of American justice to permit successive prosecutions until a conviction is obtained.

It is especially vital to recognize this safeguard in trials by court-martial since soldiers are not accorded the right of trial by jury, bail, appeal and other safeguards granted civilians to insure against miscarriages of justice. Soldiers are tried according to the Articles of War (10 U. S. C. A., Secs. 1471 *et seq.*) and the Manual for Courts-Martial U. S. Army. In criminal cases in civil courts the

trial is presided over by a judge learned in the law, and conviction or acquittal requires unanimity of a twelve-man jury selected from the community. In general courts-martial cases the Commanding Officer directs that certain cases be tried before a general court-martial appointed by him, composed of officers selected by him, and the members of the court-martial are both judge and jury (10 U. S. C. A., Secs. 1475, 1479, 1502, 1542). Conviction requires concurrence of three-fourths or two-thirds of the members present, depending on the offense charged (10 U. S. C. A., Sec. 1514). Failure to obtain this required concurrence results in acquittal (Manual for Courts-martial, Sec. 78d). The judgment of conviction of petitioner, assailed as void in this proceeding, was entered by a divided court (R. 67) composed of officers no one of which was a lawyer (R. 46).

The power of the court to terminate a trial because of imperious necessity, without affording the accused the right to plead former jeopardy in a subsequent prosecution for the same offense, has been recognized.

What is the extent of this power? In *U. S.* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (a case involving the discharge of a jury which was unable to agree) the court said:

> "To be sure, the power ought to be used with the greatest caution, under urgent circumstances; and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

In *Cornero* v. *U. S.*, (C. C. A. 9) 48 F. 2d 69, the facts were these: Cornero and others were charged with conspiracy to violate the National Prohibition Act. On May 3, 1928, when the case was called for trial, the Dis-

trict Attorney proceeded to impanel the jury without having ascertained whether or not his witnesses were present. He was relying on the testimony of two of the co-defendants who had previously plead guilty and who were released under bond to appear for sentence on the day of the trial. The court continued the case from time to time to May 8th, at which time the District Attorney moved for a further continuance, stating the matter involved intimidation of witnesses. The defendants opposed the continuance and moved for an instructed verdict of not guilty. The court discharged the jury over defendants' objection and exception. On May 6, 1930, Cornero was again brought to trial. He interposed a plea of former jeopardy which was overruled. He was convicted and appealed. The court reversed the judgment with instructions to dismiss the case and discharge defendant. The court said, l. c. 71, 73:

> "We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. * * * mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of his right to claim former jeopardy upon a subsequent trial where the jury is discharged without his consent and notwithstanding his objection."

In this case, to paraphrase the language of the majority opinion (R. 101) it was wholly infeasible, if not impossible, to produce the absent witnesses before the court at its location at the time the court discharged the jury. The court discharged the jury not because the witnesses were absent, but because they could not be produced by the prosecution. Although the court below cites this case with approval (R. 100), it has decided petitioner's case in

disregard of the law announced in it. The judgment of the court below is also in conflict with *U. S.* v. *Shoemaker*, 27 Fed. Cas. (No. 16279), 1067; *State* v. *Richardson*, 47 S. Car. 166, 25 S. E. 220; *Allen* v. *State*, 52 Fla. 1, 41 So. 593, and *Pizano* v. *State*, 20 Tex. App. 139, 54 Am. Rep. 511, which it nevertheless cites with approval (R. 100). It is also in conflict with *U. S.* v. *Watson*, 28 Fed. Cas. (No. 16651) 449. See also *State* v. *Grayson*, 156 Fla. 435, 23 So. 2d 484; *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606; *U. S.* v. *Kraut*, 2 F. Supp. 16.

The absence of witnesses from a trial is a common thing. The causes for the absence of the witnesses may arise before or during trial. These causes are frequently unknown to the court and counsel. The feasibility or possibility of producing absent witnesses may depend on various factors, such as the reach of the court's process, the availability of funds to locate and transport them, their willingness or ability to attend the trial, the ability to locate them, the time and space involved.

The holding of the court below that absence of witnesses justified the withdrawal of this case from the 76th Division court-martial on the determination that it may have been infeasible or impossible to produce them, and that this situation arose subsequent to the continuance of the trial for the purpose of obtaining their attendance (even if that determination were correct) is unsupported by reason or authority and violates the fundamental constitutional right of petitioner not to be twice put in jeopardy for the same offense. This holding is susceptible of great abuse and this case is a terrifying example of such abuse. Petitioner is entitled to the presumption that the 76th Division court-martial would have acquitted him just as the Fifteenth Army court-martial acquitted Cooper in his first trial (R. 45).

B.

The Commanding General not being a part of the 76th Division court-martial was without power or discretion independent of the court and without the knowledge of petitioner to determine that the case should be withdrawn for reasons of imperious necessity.

Here again for the purposes of this argument we assume that the Commanding General determined that it was necessary or advisable to withdraw petitioner's case and refer it to the Commanding General Third Army for trial before another court-martial. The Commanding General is as much a part of the prosecution as a grand jury which indicts, or the attorney general or other chief law enforcement officer instituting criminal prosecutions in civil courts. He is not in the position of a presiding judge. He does not preside. He is not a judge. He does determine what cases to refer to a general court-martial for trial (10 U. S. C. A., Sec. 1542) and does have power to approve or disapprove a court-martial finding and sentence (10 U. S. C. A., Secs. 1517, 1518). These are *ex parte* proceedings. He cannot usurp the function of the trial court-martial to determine matters arising in the trial. The Commanding Officer in withdrawing a case from a court-martial is acting in an administrative and not a judicial capacity. He is acting in the role of a prosecutor who decides that the case should not be prosecuted. A presiding judge on the other hand, acts in a judicial capacity.

In this case the 76th Division court-martial did not declare a mistrial. In a letter to the Trial Judge Advocate of that court the Commanding General directed that no further proceedings be taken by the court in connection with the case (R. 69, 68). Petitioner had no knowledge that the Commanding General was going to withdraw or

had withdrawn his case from the 76th Division court until he was charged before the Fifteenth Army court (R. 43).

In *Baker* v. *Commonwealth*, 280 Ky. 165, 132 S. W. 2d 766, the court said:

> "It is generally held also that the incapacity of a juror from further service and the necessity for discharge are matters requiring a judicial finding, to be heard and determined by judicial methods, and it is prejudicial error for the court on its own motion or on mere reports and in the absence of the accused, to determine that a necessity exists requiring the discharge of a jury." See also *U. S.* v. *Shoemaker*, *supra*; *State* v. *Richardson*, *supra*.

Even if we assume a judicial power in the Commanding General to withdraw cases from a court-martial appointed by him for the purpose of a second trial its exercise under the circumstances of this case would have constituted an unconstitutional abuse of power. See *Cornero* v. *U. S.*, *supra*; *Pizano* v. *State*, *supra*.

C.

The findings of fact of the trial court were right. The findings of the court below, inconsistent therewith, are not supported by any evidence and are contrary to the evidence.

The inconsistency between the findings of the trial court and the court below arises from the effect given to the tactical situation. The trial court found that the tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25). The court below found that "it is fairly clear" that the withdrawal was based upon the tactical situation intervening and developing after the

trial, which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

At the outset it should be noted that the parties adopted the statement of facts contained in the holding of the Board of Review (R. 13). Furthermore the trial court had before it the complete court-martial records whereas the court below apparently examined only the transcript of the record settled by the parties upon the basis of the statement of the points relied upon by respondent. The court below bottomed its findings upon the 4th indorsement to the charge sheet (R. 100-101) and judicial notice (R. 101). The communication known as the 4th indorsement transferred the case to the Third Army (R. 69, R. 16, footnote). It should be examined in conjunction with the letter of withdrawal (R. 68-69) which was introduced in evidence before the Fifteenth Army court-martial (R. 68-69, 122) and the proceedings before the 76th Division court-martial in connection with the closing and reopening of the case (R. 69, 15-16). It should be examined in the light of the fact that the Commanding General (or whoever wrote the indorsement for him) must have known that a new trial would involve the attendance not only of the German witnesses, residents of Krov, but also the American witnesses, members of the 76th Division, who would have to travel from the point where their organization was located at the time of the new trial to the place where the new trial was conducted (unless the new court-martial came to them). It should be examined in the light of the fact that it was not introduced in evidence before the Fifteenth Army court-martial (R. 68-69, 119-127) and was an unsworn, hearsay, *ex parte* document. Paragraph one of the communication states that two witnesses were unable to be present due to sickness, and the court continued the case so that their testimony could be obtained. The time of the discovery of this "sickness"

or the duration thereof is not indicated. It is known that the trial was commenced and concluded without them (R. 69) and later reopened to obtain their testimony. It is known that one of the witnesses (the mother of the alleged victim) did not testify in the second trial (R. 45-65). The paragraph continues "due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time." The distance is not stated. What is meant by "a reasonable time" is not stated. It is clear, however, that only sickness and distance are interposed as reasons for the absence of these witnesses. These are not unusual reasons for the absence of witnesses. The tactical situation, according to the communication, affecting only the distance to the residence of the witnesses, it did not affect the ability of the court to hear testimony from witnesses brought before it. There is no indication that it was infeasible to produce the witnesses except the inference that they were sick or physically unable to travel, a situation, which, according to the communication, existed at the time of the commencement of the trial. The court below concedes "it may be that distance or emergency growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony" (R. 101). There is not the slightest proof of any character as to the nature of the tactical situation. There is no proof that the witnesses could not have been produced before the court in a matter of hours, at any point in American occupied Germany unless they were too ill to ride in any type of army transportation, ambulance, truck, limousine or airplane. There is no proof that the court could not have gone to Krov, Germany, to hear the testimony of these witnesses if they were physically incapable of travel-

ing. Courts-martial, unlike civil courts, can meet anywhere, any time.

The court below has construed this communication contrary to its terms, giving to it a broader meaning than the unambiguous expressions contained in it apparently because of what it calls "matters of history of which judicial notice may be taken" (R. 101). The court below characterizes the movement of American forces in the European Theater as rapid (indicating absence of resistance) and conditions in the field as more or less fluid (indicating a co-mingling of American and German troops). Petitioner does not recognize this tactical situation. Petitioner does not understand how this picture affects this case.

. . . It seems evident that had it been possible for the prosecutor to establish that petitioner's case was withdrawn from the 76th Division court-martial for reasons of necessity growing out of a tactical situation he would have produced evidence before the Fifteenth Army court-martial at the time petitioner presented his plea of former jeopardy. It seems evident that if respondent had been able to establish such facts he would have produced evidence at the hearing on petitioner's habeas corpus petition.

The simple fact, plainly disclosed by the record, is that there was no necessity, justification, or excuse for the withdrawal of petitioner's case from the 76th Division court-martial for the purpose of trying him anew.

In finding otherwise, the court below disregarded the facts stipulated by the parties (R. 13), disregarded the findings of the trial court in violation of Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A., foll. Sec. 723c, and surmised a factual situation which did not exist.

D.

The judgment of the court below denies to petitioner due process of law. The validity of the court-martial judgment and order, assailed in this habeas corpus proceeding, should have been appraised on consideration of the case as it was tried and as the issue of former jeopardy was determined by the Fifteenth Army court-martial. No issue of imperious necessity was there raised or determined (R. 68-69, 119-127). The validity of the judgment of the trial court on habeas corpus should have been appraised on consideration of the case as it was tried and as the issue of former jeopardy was determined by the trial court. No issue of the infeasibility or impossibility of producing absent witnesses, due to the tactical situation, or of such a determination by the Commanding General in the exercise of a sound discretion was there made or determined.

On June 30, 1945, when petitioner pleaded and proved former jeopardy before the Fifteenth Army court-martial at Bad Neuenahr, Germany (R. 66, 68-69), or on September 28, 1946, when petitioner presented his petition for a writ of habeas corpus at Kansas City, Kansas (R. 33), had he known the basis upon which the court below was thereafter to decide his case, he would have had an opportunity to be heard and to produce evidence in opposition thereto. He had no way of anticipating these new matters.

In *Cole* v. *Arkansas*, 332 U. S. 834, 92 L. Ed. 429, 432, the court said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

This principle applies with equal force to issues raised on petitioner's plea of former jeopardy and his habeas corpus petition.

Only by a genuine trial of known issues in adversary proceedings, can the true facts be established and just judgments rendered.

CONCLUSION.

For the errors assigned, the judgment of the court below should be reversed and the judgment of the District Court affirmed. The opinion of the Chief Judge of the court below should become the law of the case.

Respectfully submitted,

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,

HARRY W. COLMERY,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

LIBRARY
SUPREME COURT, U.S.

No. 427

Office - Supreme Court, U. S.
FILED
DEC 28 1948
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1948

FREDERICK W. WADE, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

CITATIONS

Cases:

Constitution:

Articles of War:

Miscellaneous: Page

military situation it was inadvisable to proceed with the trial before the court-martial which he had appointed and, accordingly, he withdrew the charges and transferred them to another command.[7] As the Court of Appeals observed (R. 102), this second step was analogous to the "determination of the judge of a civil court that in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury." It is essential to keep in mind the distinction between the court-martial's call for the production of additional witnesses, which occasioned the continuance of the trial, and the war-time exigencies which thereafter made it impracticable to proceed with the trial before that court.[8]

The historical setting in which the military commander acted in withdrawing the charges fully supports the conclusion reached by the Court of

[7] In contending that the Commanding General, as "a representative of the prosecution," is "without power or discretion to terminate a case after jeopardy has attached without hazarding the constitutional defense of double jeopardy" (Pet. 16-17), petitioner confuses the existence of his authority with the consequences of its exercise. The officer empowered to convene a court-martial has full power to withdraw any charges from consideration by such court, to enter a *nolle prosequi* as to any charges, and to dissolve the court itself. *Manual for Courts-Martial*, corrected to April 20, 1943, pars. 5a, 5b, 5c and 72; 1 Winthrop, *Military Law and Precedents* (2d ed., 1896), 224-225, 370-371. Whether or not this authority is exercised under such circumstances as to create a bar to a second trial depends, as we show in the text, upon whether or not the termination of the trial was due to necessity.

[8] See 48 Col. L. Rev. 299.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 427

FREDERICK W. WADE, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 97-106) are reported at 169 F. 2d 973. The opinion of the District Court ordering petitioner discharged from custody (R. 12-26) is reported at 72 F. Supp. 755. The oral opinion of the District Court on respondent's motion for reconsideration (R. 92-95) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 7, 1948 (R. 107), and a petition

for rehearing (R. 111-127) was denied October 8, 1948 (R. 128). The petition for a writ of certiorari was filed November 18, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also 28 U. S. C. 2101(e).

QUESTIONS PRESENTED

1. Where a trial by court-martial in wartime in a combat area was adjourned by the court for the purpose of hearing further testimony and during the adjournment the charges were withdrawn by the appointing military commander on account of a change in the tactical situation which made the distance to the residence of the additional witnesses so great that the trial could not be completed within a reasonable time, was the accused placed in such jeopardy that he could not thereafter be tried for the same offense?

2. Whether the Court of Appeals, in the habeas corpus proceeding where the evidence showing the reason for the military commander's withdrawal of the charges from the court-martial consisted entirely of writings, was warranted in finding the commander's reason for such withdrawal to be different from that found by the District Court.

3. Whether the action of the court-martial in overruling the plea of double jeopardy and exercising jurisdiction in the case may be supported by matters dehors the court-martial record in a habeas

corpus proceeding which collaterally attacks the jurisdiction of the court-martial on the double jeopardy issue.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner, while serving in the 76th Infantry Division of the Army, on duty in the European Theater of Operations, was charged under the 92d Article of War (10 U. S. C. 1564) with the rape of a German woman. A general court-martial, which was appointed by the Commanding General, 76th Infantry Division, convened on March 27, 1945, at Pfalzfeld, Germany, about 22 miles from Krov,

where the alleged offense had been committed.[1] The prosecution and defense each presented evidence and rested, and, after closing arguments by both sides, the case was submitted and the court-martial closed. Some time later, still on the same day, the court-martial opened, announced its desire to hear the testimony of three designated persons, and further announced that the court would be continued until a later date to be fixed by the trial judge advocate. (R. 16, 60, 69.)

Seven days later, on April 3, 1945, the charges were withdrawn from the court-martial by the Commanding General, 76th Infantry Division, who directed that no further proceedings be taken by the court (R. 69; Pet. 4). On the same day he transmitted the charges to the Commanding General, Third United States Army, with the following communication (R. 16):

> 1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the

[1] Another soldier who was separately charged with the rape of another German woman on the same occasion was tried together with petitioner with their consent (R. 67) and was ultimately acquitted (R. 45). His presence in the case is immaterial to the issues here presented.

Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

3. The Trial Judge Advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

On April 18, 1945, without taking further action, the Commanding General, Third United States Army, transmitted the charges to the Commanding General, Fifteenth United States Army, with the following communication (R. 16-17):

1. Transmitted herewith are charges and allied papers in the case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, charged with rape of a German woman under Article of War 92. The German civilian against whom the crime was committed and other necessary civilian witnesses are residents of territory now under your jurisdiction.

2. It is impracticable to try this case by court-martial appointed at this headquarters

at this time in view of the tactical situation and fact that the location of the incident and places of residence of necessary civilian witnesses are a considerable distance without the boundaries of this command. Standing Operating Procedure No. 35, Military Justice—Continental Operations, published 16 July, 1944, by Headquarters European Theater of Operations, U. S. Army, provides that when practicable the trial of cases involving the peace and quiet of a civil community will be held in the immediate vicinity of the alleged offenses. In order to accelerate the prompt trial of these offenses, it is requested that you assume court-martial jurisdiction in these cases.

3. The accused is at present in confinement in the Third U. S. Army Stockade, but will be delivered upon request to such place as you may designate.

Thereafter, on April 26, 1945, the charges against petitioner were referred for trial to a general court-martial which was convened by the Commanding General, Fifteenth United States Army, on June 30 and July 1, 1945, at Bad Neuenahr, Germany (R. 8), about 40 miles from Krov. Petitioner pleaded double jeopardy in bar (R. 13-14, 46, 68-69) but the plea was overruled by the court (R. 46, 69) and, after trial, he was found guilty (R. 8, 46) and sentenced to dishonorable discharge, total forfeitures, and life imprisonment (R. 9).

The Staff Judge Advocate, Fifteenth Army, upon review[2] (R. 45-66), held the record of the trial legally sufficient but recommended that the sentence be reduced in view of petitioner's combat record, and the Commanding General, Fifteenth Army, thereupon approved the sentence but reduced the period of confinement to twenty years (R. 9). In compliance with the requirements of AW 50½ (10 U. S. C. 1522), the record of trial was then reviewed (R. 66-78) by Board of Review No. 4 in the Branch Office of the Judge Advocate General, European Theater, and that Board found substantial competent evidence to support the finding of guilt (R. 68). The Board was of the opinion, however, that the plea of double jeopardy should have been sustained (R. 69-78). The Assistant Judge Advocate General in charge of the Branch Office, upon review pursuant to AW 50½, disagreed on the ground that, since the Commanding General of the 76th Infantry Division, in the exercise of his discretion, had determined that the tactical situation made the obtainment of the designated witnesses impracticable and precluded prompt disposition of the case, the doctrine of "imperious necessity" justified him in withdrawing the charges from the first court-martial in the interests of the military necessities of his command (R. 78-87). After consideration of these divergent

[2] Pursuant to AW 46 (10 U.S.C. 1517) and par. 87b, *Manual for Courts-Martial.*

views, the Commanding General, European Theater, acting in accordance with AW 50½, confirmed the sentence on December 21, 1945 (R. 10).

Petitioner, who was confined under the sentence in the United States Penitentiary at Leavenworth, Kansas, petitioned the District Court for the District of Kansas for a writ of habeas corpus (R. 2-8), asserting, in substance, that the sentence was illegal because he had been twice placed in jeopardy for the same offense, in violation of the Fifth Amendment and of Article of War 40 (10 U. S. C. 1511). After a hearing, the district court held that petitioner was illegally detained and ordered him released on bond, saying, *inter alia* (R. 25)—

> * * * if the record in the case at bar indicated that the "tactical situation" was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of "imperious" or "urgent" necessity] is applicable. As previously pointed out, however, the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it.

The court's judgment was dated May 9, 1947 (R. 26). Thereafter, on June 12, 1947 (R. 26-30), a motion for reconsideration was filed, addressed to the paragraph just quoted, in which the Government offered to show "that it was the tactical situations arising out of the concluding six weeks of

hostilities in the European Theafer of Operations against the armies of the German Reich which were in fact responsible for the action taken here" (R. 27). The court denied the motion for reconsideration on the ground that it was essentially a motion for a new trial, not filed within ten days after final judgment, and that the court was accordingly without jurisdiction to entertain it (R. 31, 92-95).

Upon appeal to the Court of Appeals for the Tenth Circuit the judgment was reversed and the cause remanded with directions to deny the petition for a writ of habeas corpus and remand petitioner to respondent's custody (R. 107). The Court of Appeals, one judge dissenting, held that in view of the military situation prevailing at that time, of which judicial notice was taken, the Commanding General's decision to withdraw the charges and refer them to another command for trial because of the rapid advance of his troops was grounded in necessity and, therefore, the subsequent proceedings did not violate the double jeopardy provision (R. 100-102).

ARGUMENT

1. Article of War 40 (10 U. S. C. 1511) provides:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if

there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.[3]

It will be observed that under the language of Article of War 40, quoted above, petitioner was not subjected to a second trial, because the first court-martial proceeding was not a trial within the meaning of that article, since neither the reviewing nor the confirming authority had taken any action be-

[3] The precursors of this article in the articles of 1806 (2 Stat. 359, 369), 1874 (R. S. 1342), and 1916 (39 Stat. 619, 650, 657) provided simply that no person "shall be tried a second time for the same offense."

fore the withdrawal of the charges from that court. There is, however, no occasion to determine whether Article of War 40, apart from the double jeopardy clause of the Fifth Amendment, controls the instant case. The Board of Review (R. 70), the Assistant Judge Advocate General (R. 79), and both courts below (R. 21, 99-100) all assumed that the double jeopardy clause applies to proceedings before courts-martial, and that "jeopardy" attached when petitioner was put to trial. We submit that it is unnecessary to reach those questions in this case because the issue presented, i. e., whether petitioner was twice put in jeopardy, may be resolved under the doctrine of necessity, a doctrine long recognized in the law of double jeopardy. And for like reason, we submit that it is unnecessary to consider the problem whether a civil court may, upon collateral attack by way of habeas corpus, review the decision of a military tribunal overruling a plea of double jeopardy. Conceding, *arguendo*, therefore, that the double jeopardy clause in the Fifth Amendment applies to court-martial proceedings[4] and that a civil court may review a court-martial decision overruling a plea on the attachment of former jeopardy,[5] we do not find any merit in petitioner's contention (Pet.

---

[4] In *Carter* v. *McClaughry*, 183 U. S. 365, 387-390, the question whether the Fifth Amendment applies was expressly reserved. But cf. *Grafton* v. *United States*, 206 U. S. 333, 352.

[5] But see *Carter* v. *McClaughry*, 183 U. S. 365, 388-390; *Sanford* v. *Robbins*, 115 F. 2d 435, 439 (C.C.A. 5), certiorari denied, 312 U. S. 697.

14-15) that the court below was wrong in holding that he was not subjected to double jeopardy.

The doctrine of double jeopardy contemplates that even civil courts of justice have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" (*United States* v. *Perez*, 9 Wheat. 579, 580); and that, when a jury has been so discharged, the defendant has not been in such jeopardy as would constitutionally bar a new trial. *Pratt* v. *United States*, 102 F. 2d 275, 280 (App. D. C.). The cases relied upon by petitioner as in conflict with the decision below (Pet. 14) explicitly recognize that the double jeopardy doctrine is qualified by the corollary principle that the stopping of a trial for necessary reasons arising during its course does not preclude a subsequent trial before another jury.

"Necessity" may be manifest in a variety of instances. Thus, it is not double jeopardy if the first jury is discharged because of failure to agree (*United States* v. *Perez, supra; Logan* v. *United States*, 144 U. S. 263. See *Dreyer* v. *Illinois*, 187 U. S. 71; *Keerl* v. *Montana*, 213 U. S. 135); because it appears in the course of the trial that a juror is acquainted with a defendant (*Simmons* v. *United States*, 142 U. S. 148); because one of the petit jurors was a member of the grand jury that

returned the indictment (*Thompson* v. *United States*, 155 U. S. 271); or because the trial judge becomes ill (*Freeman* v. *United States*, 237 Fed. 815 (C. C. A. 2)). On the other hand, where a case is taken from a jury for reasons of convenience rather than necessity, the defendant is held to have been in jeopardy and may not be retried. Thus, a defendant cannot be retried where the prosecutor enters a *nolle prosequi* because his evidence appears insufficient (*Clawans* v. *Rives*, 104 F. 2d 240 (App. D. C.)); or when he proceeds without having all of his witnesses present (*Cornero* v. *United States*, 48 F. 2d 69 (C. C. A. 9)); or where the trial judge withdraws counts of an indictment from the jury's consideration purely as a matter of convenience (*United States* v. *Kraut*, 2 F. Supp. 16 (S. D. N. Y.)).

In the instant case, the court-martial directed the production of additional witnesses and adjourned until they could be produced.[6] Thereafter, during the adjournment, the military commander determined that in view of the developments in the

---

[6] See Manual for Courts-Martial, par. 75a:

"The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

Appeals. Beginning on the day after the court-martial's adjournment on March 27, 1945, the 76th Division commenced an advance into Germany and in consequence moved its headquarters 14 times in less than a month, over a distance of some 275 miles (see graphic sketch, App. *infra*, reproduced from map facing R. 30).

When the charges were withdrawn from the court-martial on April 3, 1945, the 76th Division's headquarters was already over 70 miles from Pfalzfeld, the original place of trial, and about 100 miles from Krov, where the witnesses resided.[2] The Commanding General of the 76th Division, upon whom was imposed the duty of supervising the proper functioning of the general courts-martial under his jurisdiction, was called upon to determine not only how the witnesses whose testimony the court had required would be produced, but also whether it was advisable to bring them to the place of trial. The solution of this problem involved many factors of which he was the best judge, among which were the expediency and desirability of transporting German witnesses from their homes to the place of trial when they had to be moved a considerable distance in time of combat; the methods and means of feeding and billeting

[2] Between the time the Third Army received the papers in the case and the time it sent them to the Fifteenth Army, its own front lines had advanced as much as 125 miles at some points (see graphic sketch, App., *infra*, reproduced from map facing R. 30).

them while they were absent from their homes; and the time and energies of personnel which would be consumed in the effort. His decision that the military situation required the withdrawal of the charges and their transfer to a court-martial which could be convened near the scene of the crime was based upon the military necessities of his command and, we submit, properly came within the doctrine of necessity.[10]

In this connection, it is also important to bear in mind that military courts differ from civil courts. The latter have fixed places of trial and fixed terms of court; calendars are published in advance; the prosecutor knows when his witnesses must be ready and he has process to secure their attendance. On the other hand, as the Assistant Judge Advocate General pointed out (R. 80-81):

> * * * Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sit-

[10] An additional reason for transmitting the charges to another command was an Army regulation which provided that when practicable cases involving the peace of a civil community should be tried in the immediate vicinity of the alleged offenses (R. 17, fn. 4).

> ting. There are no terms of courts-martial * * * *, and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

When due regard is given to these basic differences between civil and military courts, the determination of a military commander, made in good faith, that the tactical situation required the withdrawal of a case from a court-martial prior to the completion of the trial should be held as conclusive as the decision of a federal district judge that a jury is unable to agree. Certainly, the latter's determination cannot be reviewed, for, as stated in *Logan* v. *United States*, 144 U. S. 263, 298, "* * * whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion."

We do not mean to suggest that it would have been open to the military commander under the pretense of acting on tactical considerations to withdraw the case by way of *nolle prosequi* and then transmit the charges for a new trial by another

court-martial appointed by him. The rule of double jeopardy might well apply under those circumstances. Cf. *Clawans* v. *Rives*, 104 F. 2d 240 (App. D. C.). But where, as here, no showing has been made that the reason assigned by the military commander for his action was sham, it should be accepted as conclusive.

2. Since the evidence of the reason for the withdrawal of the charges from the first court-martial was all documentary or matters to be judicially noticed, the Court of Appeals was in the same position as the District Court to make deductions and conclusions. *A fortiori*, the appellate court could reach its own conclusions independently of those reached by the District Court on the reason for the military commander's withdrawal of the charges. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671. Although the reasons for this action by the Commanding General, 76th Division, do not appear in the communication addressed to his subordinate officer, the Trial Judge Advocate, by which he withdrew the charges (Pet. 4), the memorandum on his behalf transmitting the charges to the Commanding General, Third Army, referred to "the tactical situation" as having made the distance to the residence of the desired additional witnesses so great that the trial could not be completed within a reasonable time (R. 16). By taking judicial notice of the rapid movement of the armed forces in that theater and the fluid conditions

which obtained in the field at that time, the Court of Appeals inferred—properly, we submit—that "the withdrawal of the charge from the court-martial was not predicated solely upon the absence of the witnesses at the time of the trial, through oversight or otherwise, or solely upon the absence of the witnesses at the time the charge was withdrawn. Instead, it is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce such persons before the court-martial at its then location" (R. 101).

3. Petitioner also contends (Pet. 15) that since the court-martial which overruled the plea of double jeopardy did not base its decision upon the doctrine of imperious necessity, reliance upon that ground by the Court of Appeals constitutes a denial of due process of law.

The record does not disclose the reasons for the court-martial's decision in overruling the plea in bar. The highest military authority of review considered the issue whether the withdrawal of the charges from the first court-martial was due to necessity and approved the sentence only after considering the whole record, including the opinion of the Assistant Judge Advocate General that the requirement of "imperious necessity" was satisfied (R. 82, 9-10). The basic fallacy of petitioner's position is his supposition that the validity of the court-

martial's assumption of jurisdiction must rest, in habeas corpus proceedings, on matters shown to have been introduced before the court martial. We think the law is otherwise. Just as a petitioner in habeas corpus is free to go outside the record to establish lack of jurisdiction in the tribunal which tried him (e.g., *Johnson* v. *Zerbst*, 304 U. S. 458; *Von Moltke* v. *Gillies*, 332 U. S. 708) so the respondent similarly may support that jurisdiction by matters dehors the record (*Givens* v. *Zerbst*, 255 U. S. 11; *Bowen* v. *Johnston*, 306 U. S. 19).[11]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOHN R. BENNEY,
HAROLD D. COHEN,
Attorneys.

DECEMBER 1948.

[11] *Cole* v. *Arkansas*, 333 U. S. 196, cited by petitioner (Pet. 15, 17), is not to the contrary. In that case the petitioners were convicted under one section of a statute and the convictions were affirmed under another section, violations of which had not been charged. The situation here is clearly distinguishable. The affirmance by the military agencies of review was for the very offense of which petitioner had been charged and convicted (R. 8-10).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 812627 304

fundamental requirements of due process of law, enforceable by the courts. Cf. *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, 665-666 (C.A. 3). Such theoretical possibilities of misuse, curable when they arise, should not render the statute void.

The constitutional conception of double jeopardy has an irreducible core—prohibition of successive punishments for the same offense—and an undefined penumbra shading off to meet the sometimes competing forces of the efficient administration of criminal justice and the punishment of the guilty. Cf. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462-463, 469. It is in this outer area that the special military rule incorporated in AW 40 has its function, and it is this area which the complex of differing state jeopardy principles proves to be unmarked by defined boundaries. The multitude of variants in the treatment of double jeopardy in state constitutions, statutes, and decisions show,[16] we think, that there exists a periphery in which discretion and selection is allowable, and that the choice Congress made, with respect to military proceedings, falls within that area. Some states, for instance, seem in accord with AW 40 in permitting the defense of former jeopardy only where a previous conviction or acquittal exists. *E. g.*, *Hoffman* v. *State*, 20 Md. 425, 433; *Anderson* v. *State*,

[16] These have been collected in the American Law Institute's Proposed Final Draft of the chapter on Double Jeopardy of the Institute's Code of Administration of the Criminal Law (March 1935), pp. 61-92. Another extensive collection of cases is contained in Note (1940) 24 Minn. L. Rev. 522.

86 Md. 479; 482 (jeopardy does not attach until verdict); *Lovern* v. *State*, 140 Miss. 635 (previous case dismissed at request of county attorney for insufficiency of evidence); *Smith and Bennett* v. *State*, 41 N. J. Law 598; *State* v. *Van Ness*, 82 N. J. Law 181, 183 (previous jury improperly discharged by clerk before verdict). Other states prescribe still other variations, *e. g.*, *Palko v. Connecticut*, 302 U.S. 319 (new trial at instance of state). The rules are many, the shadings both large and fine. Functioning in a sector of the law such as this, the traditional military rule cannot be stigmatized as invalid, even though it differ from the comparable civil principle controlling in the federal courts.

b. The historical roots and support for the military rule go deep, as we have pointed out (*supra*, pp. 25-32). The rule also gains its strength from the nature of courts-martial and their fundamental differences from civilian tribunals, which bear upon the appropriate double jeopardy principle to govern their proceedings. These differences, and the resulting problems of military justice, have been ably sketched by the Assistant Judge Advocate General in his review in this case (R. 80-82). The personnel of courts-martial differ from those of the civil courts in training, major occupation, availability, and competing demands upon their services. Courts-martial are temporary and mobile, in contrast to the permanent duration and static location of civil tribunals. Combat or field conditions are likely to give rise to unexpected,

burdensome, or uncontrollable emergencies. The problems of securing witnesses and of having them available are hardly the same, especially on foreign soil and in a zone of combat operations. The problems of guarding and maintaining prisoners are greater. "In order to perform their duties efficiently and expeditiously, they [courts-martial] must possess a high degree of flexibility." They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command" [17] (R. 81). These factors all warn against an automatic transfer of civil law rules of criminal justice and automatic rejection of the variant which has developed in the military law.

The co-existence of partially separate rules of double jeopardy for civil and military proceedings is neither unique nor strange in the application of the protections of the Bill of Rights. The meaning of Due Process of Law plainly differs in many respects for those in the military service (cf. *Reaves v. Ainsworth*, 219 U.S. 296, 304). The soldier's rights of free speech and assembly are doubtless less broad (cf. *Board of Education v. Barnette*, 319 U.S. 624, 642). Though he is entitled to defense counsel, he has no absolute all-embracing constitutional right to have a lawyer as counsel. And it is not unlikely that certain punishments inflicted on him (*e. g.*, restriction to limits of specified areas; loss of privileges) would be held violative of the

[17] See *infra* pp. 45-48, for a discussion of the specific problems which arose in the instant case.

Eighth Amendment if imposed by civil courts on civilians. The Amendments' protections are applied, not mechanically, but in the light of the differing status, circumstances, and conditions.

d. The power of Congress to declare an allowable double jeopardy rule has already been judicially upheld by a Court of Appeals, in a situation raising a related problem. In *Sanford v. Robbins*, 115 F. 2d 435 (C.A. 5), certiorari denied, 312 U.S. 697, the accused had been tried for rape and sentenced to death under the 1916 Articles of War (39 Stat. 650-670), which made no provision for rehearings, *i. e.*, new trials. But the Acting Judge Advocate General held that the errors committed had been so fundamental that they reached the very jurisdiction of the court-martial, and the President, on the strength of that holding, ordered a new trial. At the new trial, accused's plea of double jeopardy was overruled by the court-martial, he was found guilty and sentenced to life imprisonment, and this second sentence was approved by the President in 1920. Nineteen years later, the accused sued out a writ of habeas corpus. The Court of Appeals held, reversing the district court, that the second court-martial's action in overruling the plea of double jeopardy was not reviewable on habeas corpus (115 F. 2d at 437; see *supra*, p. 21), but that, in any event, the court-martial's ruling was correct. Considering the 1920 form of AW 40, together with the appellate procedure of AW 50½, as confirming the President's earlier order for a new trial, the court said that by its 1920 Act Congress had

construed the Constitution to permit an unconsented second hearing of a case on stated conditions, and that it was not inclined to hold the statute unconstitutional, even though, it implied, the civil practice was different. 115 F. 2d at 439.

3. *Application of the military rule to petitioner's case:* Under this military rule of double jeopardy, as we read it, petitioner obviously has no case, and the district court so recognized (R. 20). He was neither convicted nor acquitted at his first trial, nor did that court-martial make any finding as to his guilt or innocence. We show below that the Commanding General, 76th Infantry Division, was authorized to withdraw the charges as he did (*infra*, pp. 48-52), but even if he acted improperly, no more than a mistrial resulted, and the first proceeding—not ending in conviction or acquittal—could not raise a bar to retrial. Cf. *Manual for Courts-Martial, 1928,* pars. 5a, 72 (quoted *supra* p. 32); *State* v. *Van Ness,* 82 N. J. Law 181 (clerk's improper discharge of jury before verdict did not create defense to second trial).[18]

---

[18] There is no Article for the Government of the Navy dealing with double jeopardy, comparable to AW 40, but Section 408 of *Naval Courts and Boards* provides a rule which differs from the military rule in two particulars. The present Section 408 provides:

> The fifth amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." A person is twice put in jeopardy if he is twice put on trial for the same offense. In order, however, to sustain a plea of former jeopardy, the accused must show that:

C. Even if the general civilian principles of double jeopardy apply, petitioner's defense is not sustainable.

1. The rule in the civil courts is that, where a trial is stopped on the ground of necessity, the defendant can thereafter be retried consistently with the double jeopardy clause of the Fifth Amendment.

The doctrine of double jeopardy, as applied in the criminal courts of the United States, contem-

---

(1) Upon a former trial, he had been actually acquitted or convicted; or

(2) Upon a former trial, after he had been arraigned and the prosecution had rested its case, the convening authority entered a nolle prosequi (or withdrawal or discontinuance), over the objection of the accused, in order to prevent the court-martial from arriving at a finding.

In either case set out above, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority. But the proceedings upon a "fatally defective" specification do not constitute former jeopardy.

This provision does not incorporate the appellate procedure in the concept of "trial" as does AW 40, and, in Subparagraph (2), establishes a specified type of *nolle prosequi* as a bar. (This latter exception was added in 1947.)

In the present case, the Navy provision would reach the same result as the Army rule, since there has been no prior conviction or acquittal, and no claim (or showing) that the charges were withdrawn to prevent the first court-martial from arriving at a finding. See *supra* pp. 32, fn. 15, *infra* pp. 55, 56-57, fns. 24-25.

The British rule on retrial after a discontinued or interrupted trial appears to be the same as the military rule; as we have set it forth. See *Manual of Military Law*, 1929 (1939 reprint), pp. 564, 662, 480.

plates that these courts have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere" (*United States* v. *Perez*, 9 Wheat. 579, 580), and when a jury has been thus discharged, the defendant may again be tried for the same offense.

The principle has been applied in a variety of circumstances. Thus, it is not double jeopardy if the first jury is discharged because unable to agree (*United States* v. *Perez*, *supra*; *Logan* v. *United States*, 144 U.S. 263; see *Dreyer* v. *Illinois*, 187 U.S. 71; *Keerl* v. *Montana*, 213 U.S. 135), or because it appears, in the course of the trial, that a juror is acquainted with the defendant (*Simmons* v. *United States*, 142 U.S. 148; *United States* v. *McCann*, 36 F. 2d 52 (S.D. N.Y.)); or because one of the petit jurors was a member of the grand jury which returned the indictment (*Thompson* v. *United States*, 155 U.S. 271); or where the appearance of prejudicial articles in the public press was thought to make a fair trial impossible (*United States* v. *Montgomery*, 42 F. 2d 254 (S.D. N.Y.)); or where the trial judge was of the opinion that his own remarks had been prejudicial (*United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla.)); or where a juror appeared to be insane after the

commencement of the trial (*United States* v. *Haskell*, 4 Wash. C. C. 402, Fed. Case No. 15321, 26 Fed. Cas. 207 (C. C. E. D. Pa.)); or where the first jury was discharged because the defendant was not rearraigned after the overruling of his demurrer to the indictment (*Loiato* v. *New Mexico*, 242 U. S. 199; *United States* v. *Riley*, 5 Blatchf. C. C. 204 (C. C. S. D. N. Y.) Fed. Case No. 16164); or where the proceedings were discontinued because of the illness of the trial judge (*Freeman* v. *United States*, 237 Fed. 815 (C. A. 2)), or the incapacity of a juror (*United States* v. *Potash*, 118 F. 2d 54 (C. A. 2), certiorari denied, 313 U. S. 584; *United States* v. *Bigelow*, 14 D. C. Rep. 393, 401 (Sup. Ct. D. C.), habeas corpus denied, 113 U. S. 328). As Mr. Justice McLean long ago said on circuit (*United States* v. *Shoemaker*, 2 McLean 114, 119, Fed. Case No. 16279, 27 Fed. Cas. at 1068-1069 (C. C. D. Ill.)):

"* * * The discharge of a jury in a criminal case, on the ground of a necessity which could neither be foreseen nor controlled, imposes no hardship on the defendant of which he has a right to complain. He, alike with the government, must submit to the law of necessity, which, of all other laws, is the most inexorable."

On the other hand, if a case is taken from the jury for reasons of convenience rather than necessity, the defendant is held to have been in jeopardy, and may not be retried. Where the prosecutor enters a *nolle prosequi* because his evidence appears insufficient, a later trial is barred (*Clawans* v. *Rives*, 70 App. D. C. 107, 104 F. 2d 240; *United*

States v. *Shoemaker, supra*), and the same is true when he proceeds without having all his witnesses present (*Cornero* v. *United States,* 48 F. 2d 69 (C. A. 9)), or where the trial judge withdraws counts of an indictment from the jury's consideration purely as a matter of convenience (*United States* v. *Kraut,* 2 F. Supp. 16 (S. D. N. Y.)).

There have been differing theoretical formulations of the place of the necessity principle, varying with the view as to when "jeopardy attaches." It is frequently said that jeopardy attaches once evidence is heard (*Clawans* v. *Rives, supra,* at 242; *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642 (C. A. 10)), and for those courts a later discontinuance of the trial because of necessity seems to constitute a recognized exception to the prohibition against double jeopardy. See Note (1940) 24 Minn. L. Rev. 522. On the other hand, there are expressions to the effect that there can be no jeopardy until verdict (*United States* v. *Watkins,* 3 Cranch C. C. 441, 570, Fed. Case No. 16649, 28 Fed. Cas. at 479 (C. C. D. C.); *United States* v. *Haskell,* 4 Wash. C. C. 402, 410-411, Fed. Case No. 15321, 26 Fed. Cas. at 212), or if the trial fails other than on the merits (*Amrine* v. *Tines,* 131 F. 2d 827, 834 (C. A. 10)). For those who take this view, prior discontinuance of a trial for necessity cannot, of course, involve the defendant in jeopardy.

But whatever the proper formulation of the jeopardy doctrine, there is no disagreement as to the existence or significance of the necessity principle (or exception). The cases recognize its capac-

ity to meet emerging developments, and reflect a reluctance to delimit the situations in which it can properly be applied. This Court, in *United States* v. *Perez, supra*, noted that "it is impossible to define all the circumstances, which would render it proper to interfere." More recently, the Chief Justice declared, while a member of the Court of Appeals (*Pratt* v. *United States*, 70 App. D. C. 7, 12, 102 F. 2d 275, 280): "There is no better settled rule than that courts of justice may discharge a jury and order subsequent trial with no right in the defendant to contend that his constitutional rights have been invaded. This action has been taken in the past for many reasons that have manifested themselves, and will be taken in the future for many other proper reasons which will manifest themselves, in the administration of justice." And the Fifth Circuit speaks, in general terms, of the prevention of a verdict "by something serious," in contrast to the stopping of a trial "for insufficient cause." *Sanford* v. *Robbins*, 115 F. 2d 435, 438-439 (C. A. 5), certiorari denied, 312 U. S. 697.[19]

2. Petitioner's first trial was discontinued because of necessity.

The sequence of events in the present case has its counterpart in criminal trials in the civil courts. Two steps were taken. First, the court-martial

---

[19] "The truth is, that the cases recorded are but examples to illustrate the application of the rule, not rules themselves by which future judges are to be limited and restrained." *Commonwealth* v. *Purchase*, 2 Pick. 521, 525 (Mass. 1824).

directed the production of additional witnesses, as it was entitled and encouraged to do under par. 75a of the *Manual for Courts-Martial, 1928,*[20] and adjourned until they could be produced (R. 16). This step did not differ substantially from the admitted power of a Federal trial judge to call as the court's witnesses persons whom neither party feels free to call as its own witnesses (*Litsinger* v. *United States*, 44 F. 2d 45 (C.A. 7); *Young* v. *United States*, 107 F. 2d 490 (C.A. 5); *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.*, 143 F. 2d 826, 829 (C.A. 5); 3 Wigmore, *Evidence* (3d ed. 1940) sec. 918; cf. Rule 28, F.R.Crim.P.) Secondly, during the adjournment, the military commander who had convened the court-martial determined that in view of the progressive advance of his forces and the developments in the military situation, the trial should not be continued before the court-martial he had appointed. Accordingly, he withdrew the charges and transferred them to another command better situated for the trial of the accused. As the Court of Appeals observed (R. 102), this second step was analogous to the "determination of the judge of a civil court that

[20] "The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury." As it should be applied to courts-martial, and in the historical setting of this case, the principle of "necessity" (*supra*, pp. 39-43) fully justified the action taken. We shall discuss, first, the actual situation confronting the military commander; secondly, his status as appointing officer and his authority under military law to withdraw charges; and, thirdly, the factors which compel the conclusion that the discontinuance of this military trial, in these circumstances, did not establish a bar to retrial.

a. This was the spring of 1945, and American troops were advancing into Germany in the final effort to overwhelm the enemy and end the European war.[20a] Beginning on the day after the first court-martial's adjournment on March 27, 1945, the 76th Division commenced a rapid advance from the Rhine area on the West directly into the heart of Germany, which required it to move its headquarters progressively forward 14 times in less than a month, over a distance of some 275 miles (see graphic sketch, Appendix *infra*, reproduced from

---

[20a] See Biennial Report of the Chief of Staff of the United States Army, 1943 to 1945, to the Secretary of War ("The Winning of the War in Europe and the Pacific")—subsections entitled "Closing the Rhine," "The Watch That Failed", and "The Knockout."

map facing R. 30).[20b] When the charges were withdrawn from the first court-martial on April 3, 1945 (the Division rejoined the Third Army on April 2, 1945), the 76th's headquarters were already over 70 miles from Pfalzfeld, the original place of trial, and about 100 miles from Krov, where the German witnesses resided—and the Division was decidedly moving forward as fast and as far as German resistance would permit.

In these circumstances, the Commanding General of the 76th Division, upon whom was imposed the duty of supervising the proper functioning of the courts-martial under his jurisdiction, had the responsibility of determining whether the trial should be continued before the court-martial he had appointed. The solution of the problem involved the weighing of many factors, of some of which he was the only available and responsible judge. He was called upon to determine not only how the witnesses whose testimony the court-martial had required would be produced, but also whether it was advisable to bring them to the place of trial. Consideration of these matters—in the words of the Assistant Judge Advocate General—involved questions of the "expediency and desirability of transporting German witnesses from their homes to the place of trial when the witnesses must

---

[20b] See *We Ripened Fast: The Unofficial History of the Seventy-Sixth Infantry Division* for a day-by-day description of the activities and rapid advance of the 76th Division after March 18, 1945, pp. 143 *et seq.* (ch. VII, "The Third Star," and ch. VIII, "Victory").

be moved a considerable distance in time of combat; the methods and means of feeding and billeting them while they were absent from their homes, and the time and effort for his personnel consumed in this effort" (R. 84-85).[21] At the same time, it was clear that his Division was on the march, with definite combat missions to accomplish, and that, if things went well, it would quickly and progressively increase the distance between itself and the witnesses' residence (Krov). He probably had orders from higher headquarters indicating the plan of advance and attack, which would have a bearing on the problem of continuing petitioner's interrupted trial. If, instead of bringing the witnesses to the court-martial, the court-martial were to go back to Krov from the advancing battle positions of the 76th Division, perhaps even greater problems would be encountered. Eleven members of the detail of the court-martial were officers of the 385th Infantry Regiment, whose primary duties at that very moment were to successfully accomplish the defeat of the enemy as soon as possible, and their loss for the necessary time might be serious or even unthinkable. Still another factor was the admonition in Standard Operating Procedure No. 35, Headquarters, European Theater of

---

[21] At this time, it was "a matter of notorious knowledge," as the Assistant Judge Advocate General said, "that the ordinary means of travel in Germany were disrupted and in some cases entirely destroyed" (R. 81-2).

Two of the three requested additional witnesses had apparently been sick at the time of the original trial (March 27, 1945) (R. 16). Two of them were women (R. 16).

Operations, U. S. Army, 16 July 1944, that court-martial trial of offenses involving the peace and quiet of a civil community should be held in the immediate vicinity of the offenses (R. 17, fn. 4).

With these factors all present, the Commanding General determined that the charges should be withdrawn from his court-martial because of the military situation, and the case transferred to Third Army Headquarters, which was further to the rear, less directly involved in actual contact with the enemy, and closer to Kroy.[22] Third Army Headquarters was itself moving forward rapidly in the push across Germany, and the charges were subsequently transferred to Fifteenth Army Headquarters which then had jurisdiction over the Kroy area which the Third Army had left (R. 17); between the time the Third Army received the papers in the case (about April 3, 1945), and the time it transferred them to the Fifteenth Army (April 18, 1945), its own front lines had advanced as much as 125 miles at some points (see graphic sketch, Appendix, *infra*). Petitioner's trial by a

---

[22] The Commanding General pointed out that the two witnesses requested by the court had been "unable to be present due to sickness" and that "Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time" (R. 16). The words "the tactical situation" clearly referred—in military parlance—to the then existing pressing military and combat conditions. In another connection, the record contains a second reference to a "tactical situation" which indicates the combat and battle connotations of the term (R. 65).

Fifteenth Army court-martial took place at Bad Neuenahr (R. 8), about 40 miles from Krov.

b. The Commanding General's withdrawal of the charges was authorized by the military law. The officer empowered to convene a court-martial has full power to withdraw any charges from consideration by the court, to enter a *nolle prosequi* as to any charges, and to dissolve the court itself. *Manual for Courts-Martial, 1928*, pars. 5a (quoted in pertinent part, *supra*, p. 32) and 72. The power to enter a *nolle prosequi*, which in the civil courts is normally vested either in the prosecutor alone or in the prosecution with the consent of the court (cf. Rule 48(a), F. R. Crim. P., 327 U.S. at 870), is at military law wholly vested in the appointing authority, and neither the court nor the prosecutor alone may take this action. *Manual for Courts-Martial, 1928, supra.* This has always been the rule. Winthrop, *Military Law and Precedents* (2d ed. 1896, 1920 reprint), pp. 155-6, 192-3, 246-247; *Manual for Courts-Martial, 1921*, p. 128. Petitioner improperly characterizes the convening authority as "a representative of the prosecution" (Pet. 16) and as "acting in the role of a prosecutor" when he withdraws charges (Pet. Br. 23). On the contrary, the whole structure of military justice is based upon the appointing officer's impartial status "as the representative of the United States," as Winthrop puts it (op. cit. *supra*, pp. 155, 247; see for same phrase *Manual for Courts-Martial, 1921*, p. 128). And the convening authority's supreme power to withdraw charges—with or without

the concurrence of the trial judge advocate is specifically based upon that independent position. Whether or not this plenary authority is exercised under such circumstances as to raise a bar to a second trial is, of course, a different question, the answer to which will depend (as we assume in this phase of the argument) upon the reasons for withdrawal or discontinuance. This is no different from the civil practice in which a court may have power to discharge the jury, though the circumstances of discharge prohibit a retrial. Cf. *United States* v. *Kraut*, 2 F. Supp. 16, 19 (S.D. N.Y.).

Petitioner appears to argue, however, that even if the appointing officer has authority to withdraw charges, he cannot ever do so by himself without necessarily raising a bar to second trial, because the issue of need for discontinuance must be decided by the court-martial, or at least requires a hearing in which petitioner or his counsel participates (Pet. Br. 16, 23-4). But, as we have just pointed out, the military law categorically forbids the court-martial from discharging itself, withdrawing charges, or entering a *nolle prosequi*, and exclusively endows the convening officer with that authority. See particularly Winthrop, *op. cit., supra*, at 155, 247. If anyone is to decide whether the trial should be discontinued it is the convening authority on whom the responsibility lies. Moreover, his position as military commander normally makes him the best, and in some instances the only, available judge of the diverse factors bearing upon the necessity for interrupting the trial. (Compare, for

instance, the complex of factors existing in the instant case, discussed *supra*, pp. 45-48): Determination of the issue of necessity has not been, and need not be, entrusted to the members of the court-martial, particularly during the course of field operations in time of war in a foreign country. (See the review of the Assistant Judge Advocate General, R. 84-85). It is too late to deny a military appointing officer's powers and duties, or to reject his status—different from that of a civil court but not unlike that of the head of a civil administrative agency—as a combined administrative, military, and judicial authority charged with "responsibility for the proper functioning of the general courts-martial of his jurisdiction" (R. 84). It is equally idle to claim that he can only discharge this responsibility upon notice and hearing. When he refers charges for trial and when he acts as reviewing authority after conviction, there is no such requirement (cf. *United States ex rel. Weintraub* v. *Swenson*, 165 F. 2d 756, 757-8 (C.A. 2)), and we see even less reason for imposing the obligation in a matter which directly concerns the existing military situation and the needs of the command.

Once it be granted, as we think it must, that the convening authority is empowered to discontinue a trial because of necessity, it follows—and so the Court of Appeals held (R. 101-102)—that his determination cannot be upset short of a showing of abuse of discretion, or a use of the power for plainly insufficient ends. In the civil courts, where the power to discharge the jury is vested in the

trial judge, the rule is that "whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion." *Logan* v. *United States*, 144 U. S. 263, 298; *United States* v. *Perez*, 9 Wheat. 579, *Simmons* v. *United States*, 142 U. S. 148; *Commonwealth* v. *Purchase*, 2 Pick. 521, 524-5, 526 (Mass.).[23] The specialized character of the problems presented to a military commander exercising court-martial jurisdiction, as well as the historical checks on undue interference by the federal judiciary with the military justice system, impel comparable acceptance of an appointing officer's determinations of necessity.

c. Though petitioner argues stoutly to the contrary (Pet. Br. 16, 18-22), we think that in the circumstances we have described (*supra*, pp. 45-48), the Commanding General's withdrawal of the charges against petitioner constituted a wholly unexceptionable determination that military necessity required the discontinuance of the trial.

(1) Even in the civil courts, there is no absolute rule that a jury cannot be discharged, without barring a retrial, because witnesses thought to be necessary are unavailable. *Cornero* v. *United States*, 45 F. 2d 69 (C.A. 9), on which petitioner strongly relies, holds no more than that a discharge

[23] "The existence of this necessity must be determined by the court, on the high responsibility they are under to the public". Parker C.J., 2 Pick. at 524.

at the instance of a prosecuting attorney who finds, after impanelment of the jury, that his witnesses are absent is not a discontinuance from necessity. But it might well be another matter if a witness desired by the court suddenly fell ill, or even if an important prosecution witness unexpectedly became unavailable after the trial had begun. A second trial is not forbidden where the first is discontinued because of the illness of the judge (*Freeman* v. *United States*, 237 Fed. 815 (C.A. 2)) or the defendant (*United States* v. *Bigelow*, 14 D.C. Rep. 393, 401 (Sup. Ct. D. C.), or a juror (*United States* v. *Potash*, 118 F. 2d 54 (C.A. 2), certiorari denied, 313 U. S. 584), even though the alternative of continuance may exist. So, it is not unlikely that even in the civil courts a properly explained, and unanticipated, absence of important witnesses could furnish sufficient cause for a discharge which would not prevent further proceedings.

(2) But courts-martial differ significantly from civil courts, especially courts-martial in a theater of combat operations. The considerations which may lead to a finding of double jeopardy where a first civil trial is discontinued because witnesses are unavailable, for whatever reason, do not exist for military tribunals. Civil courts normally function in a more-or-less secure world; they have fixed places of trial and fixed terms of court; calendars are published in advance, and continuances are frequently arranged or allowed; the prosecutor knows when his witnesses must be ready and he has process to compel their attendance. On the other

nd, as the Assistant Judge Advocate General inted out (R. 80-81):

> * * * the static conditions of the civil courts do not prevail with respect to the military courts and particularly the military courts which must function in the field of operations and combat. Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sitting. There are no terms of courts-martial (Cf: CM ETO-16623, Colby), and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

With respect to the attendance of witnesses, he so pointed out (R. 81-82):

> * * * there is an aspect of the actual functioning of [military courts] which must be given proper weight and consideration.

> Witnesses may be compelled, under penalty of law, to attend and give testimony in the civil courts of the United States. The witnesses come to the court; the court does not go to the witnesses. In this respect there is a certainty and security upon which the prosecution and defense alike may rely. With respect to the courts-martial sitting in the United States the same condition prevails (AW 23). In the functioning of our military courts in the field, however, and particularly in foreign countries entirely different conditions exist. * * * In Germany, the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror. In the case of the latter country, however, practical considerations will weigh heavily against theoretical possibilities. At the time of the first or incomplete trial, in the instant case it is a matter of notorious knowledge that the ordinary means of travel in Germany were disrupted and in some areas entirely destroyed. * * *

(3) Here, the two witnesses requested by the first court-martial were sick at the time of the trial (R. 16), and there is no suggestion that they were deliberately withheld by the trial judge advocate. The court desired to hear them, as was its right (*supra*, p. 44), and continued the case until they could appear (R. 16). In a civil trial, the continuance would have been sufficient to handle the matter. But in this military case there then intervened the 76th Division's rapid advance across Germany—the "tactical situation" to which the

appointing authority referred in transferring the charges (R. 16). We have sketched the complexities of the problem with which he was then presented (*supra*, pp. 45-48). In good faith, "he determined that the tactical situation of his troops required that the trial be taken to the witnesses rather than the witnesses be brought to the trial", and in doing so, "he decided a question which involved the military necessities of his command" (R. 85). In the light of the circumstances and the problem presented (*supra*, pp. 45-48), of the differences between courts-martial and civil tribunals (*supra*, pp. 53-54), and of the discretion vested in the appointing officer (*supra*, pp. 48-52), this determination cannot be held an improper exercise of the power to discontinue a trial for necessity. The Commanding General's stated grounds indicate that the trial was not stopped for "insufficient cause", but for "serious" reasons. (*Sanford* v. *Robbins*, 115 F. 2d 435, 438-9 (C.A. 5), certiorari denied, 312 U.S. 697), and there is no basis for questioning his responsible evaluation of the situation.[24] As the courts have long recognized (*supra*, pp. 42-43), the necessity principle is flexible enough

[24] Petitioner asserts that "There is not the slightest proof of any character as to the nature of the tactical situation" (Pet. Br. 26). This overlooks the known historical facts of the 76th Division's advance (*supra* pp. 45-48), and equally neglects the settled rule that the burden is on petitioner to show abuse of discretion in order to sustain his plea of double jeopardy. *Kastel* v. *United States*, 23 F.2d 156, 157 (C. A. 2), certiorari denied, 277 U.S. 604; *United States* v. *Potash*, 118 F.2d 54, 56 (C. A. 2), certiorari denied, 313 U.S. 584. See *infra* pp. 63-64. Neither the dissenting judge below, nor

to cover all discontinuances for proper reasons, whenever the appropriate circumstances manifest themselves. We think it clearly governs here. Cf. (1948) 48 Col. L. Rev. 299.

We do not mean to suggest, of course, that it would have been open to the military commander under the pretense of acting on tactical considerations to withdraw the case by way of *nolle prosequi*, and then re-refer the charges to another court-martial appointed by him. In such circumstances, the rule of double jeopardy might well apply.[25] Cf. *Clawans* v. *Rives*, 70 App. D. C. 107, 104 F. 2d 240. But where, as here, no showing has been made, or attempted, that the reason assigned by the military commander was sham, it cannot be disregarded.

3. The ground on which the second court-martial rejected petitioner's plea of double jeopardy is immaterial.

Petitioner also contends (Pet. Br. 18, 28-9) that since the Fifteenth Army court-martial which overruled his plea of double jeopardy did not base its decision on the doctrine of necessity, reliance upon that ground by the Court of Appeals constitutes a denial of due process of law.

---

the trial court, intimated any question as to the nature or seriousness of the military situation. See *infra* pp. 60-64.

[25] This is on the assumption that the military rule (*supra* pp. 25-38) is not controlling. The armed forces now prohibit the withdrawal of charges in order to prevent a finding by the court (*Manual for Courts-Martial, U.S. Army, 1949*, par. 73; *Naval Courts and Boards*, sec. 408), but in the case of the Army such an improper withdrawal does not appear to be considered a basis for a later plea of double jeopardy. See *supra* pp. 32, fn. 15, 38-39, fn. 18.

The record of petitioner's trial does not disclose the reasons for the court-martial's decision in overruling the plea in bar. It merely declared that the plea was denied (R. 127). True, the prosecutor's argument stressed the fact that there had been no previous conviction or acquittal (R. 122-126), but the court had before it the record of the previous 76th Division trial, indicating the reason for the original continuance (which was also specifically called to its attention by defense counsel) (R. 120), and the court may very well have been influenced in denying the plea by its own knowledge of the effect of the campaign in Germany, and the movements of the 76th Division, on the practicability of resuming the trial when the requested witnesses were ready to testify. Certainly, the Board of Review (R. 73-76), the Assistant Judge Advocate General (R. 79-87), and the Commanding General, United States Forces, European Theater (R. 87, 9-10) all considered the issue of necessity, and the latter—the highest military authority in the case (*supra,* p. 9)—confirmed the sentence, after considering the Board's review, on the basis of the opinion of the Assistant Judge Advocate General that the requirements of the necessity principle were satisfied.

But the basic fallacy of petitioner's position is his supposition that he must be released, in a habeas corpus proceeding, unless the court-martial's rejection of his plea can be sustained on the grounds considered by that tribunal. We think the law is otherwise. He is not entitled to release

unless he can sustain his plea in *this* proceeding, just as in a proper case a prisoner can be freed on a showing of an unfair trial even though he had not made that showing to the trial court. A petitioner in habeas corpus is free to go outside the record of his trial to establish lack of jurisdiction or deprivation of rights by the tribunal which tried him (e.g. *Johnson* v. *Zerbst,* 304 U. S. 458; *Von Moltke* v. *Gillies,* 332 U. S. 708), and the respondent may similarly support the jurisdiction and proceedings of the trial court by matters dehors the record (*Givens* v. *Zerbst,* 255 U. S. 11; *Bowen* v. *Johnston,* 306 U. S. 19, 27). It would be strange if the decisions of courts-martial, generally composed of laymen, could be invalidated every time a wrong reason was given on a point of law, even though the decision itself be wholly free from error or unfairness.[26] And petitioner's argument leads to the further curious result that if the plea had excusably not been made before the court-martial, respondent would then be free in this proceeding to show that the plea was bad on any ground.[27]

[26] Cf. *Sanford* v. *Robbins,* 115 F.2d 435 (C. A. 5), certiorari denied, 312 U.S. 697, and *Wrublewski* v. *McInerney,* 166 F.2d 243 (C. A. 9), in both of which pleas of double jeopardy were denied, on habeas corpus, apparently on grounds not considered by the court-martial at the trial.

[27] The claim also seems to be made that the respondent did not present to the District Court the necessity principle, as we have argued it and the Court of Appeals decided it (Pet. Br. 18, 28). The argument of Government counsel (R. 40), and the presentation of the Assistant Judge Advocate General's opinion (R. 78-87) (which applies the necessity principle as we urge it, and which the District Court considered, R. 23-5), suffice to show the hollowness of the contention.

Cole v. Arkansas, 333 U. S. 196, cited by petitioner (Pet. Br. 28) is not pertinent. In that case, the petitioners were convicted under one section of a statute and the convictions were affirmed under another section, violations of which had not been charged. But the cardinal principle that one cannot constitutionally be convicted of a charge on which one has never been tried will not stretch to a principle that one's conviction cannot be sustained on habeas corpus unless the trial court gave the right reasons for its right decisions.

III

THE COURT OF APPEALS' DETERMINATION OF THE REASON FOR THE DISCONTINUANCE OF THE FIRST TRIAL IS CORRECT AND SHOULD BE ACCEPTED

A. It is said (Pet. Br. 17-18, 24-27) that the Court of Appeals improperly made findings in conflict with the facts stipulated by the parties, with the showing in the record, and with the findings of the District Court. These charges rest on a series of misconceptions of the record in the proceeding and of the pertinent facts.

1. There is no disagreement among the parties, the two courts below, and the military reviewing authorities, as to the actual sequence of events occurring between petitioner's first incomplete court-martial and the trial at which he was convicted. What "factual" disagreement there is has arisen, first, from varying understandings of the reasons prompting the withdrawal of the charges from the first court, and, secondly, because of different views as to the factual support for the

reasons assigned for withdrawal.[28] Respondent has never agreed with petitioner on these points of conflict, and has never entered into any stipulation or understanding about them.

2. The reasons impelling the withdrawal of the charges do not appear in the communication addressed by the Commanding General, 76th Division, to his subordinate officer, the trial judge advocate, withdrawing the charges (Pet. Br. 5), but are contained, in official documentary form, in the Commanding General's letter transmitting the charges to Third Army Headquarters, which states that due to "the tactical situation" the distance to the residence of the desired additional witnesses, who were sick at the time of the original trial, had become so great that the trial could not be completed within a reasonable time (R. 16). Bearing upon the meaning of this statement is the Third Army's later letter transmitting the charges to the Fifteenth Army (R. 17), and, most importantly, the facts of historical record as to the closing phases of the American advance into Germany in the spring of 1945, and the movements of the 76th Division (*supra*, pp. 45-48; outline map, Appendix, *infra*; R. 27-28), which are indisputable and may be judicially noticed.[29]

---

[28] Only petitioner claims that factual support for the assigned reasons is lacking. Insofar as there is any other disagreement as to the facts, it goes only to the interpretation of the assigned reasons. *Infra* pp. 61-63.

[29] See 9 Wigmore, *Evidence* (3rd ed. 1940), sec. 2580; *Clark* v. *United States*, 99 U.S. 493, 495; *Ohio Bell Telephone*

On this point, the District Court rather cryptically held (R. 25) that "the absence of witnesses, rather than an emergency due to the military situation seems to have been the reason for the withdrawal of the case from the court-martial which first heard it", and that "if the record in the case at bar indicated that the 'tactical situation' was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of necessity] is applicable". This may have meant no more than that the first trial was continued because of the absence of witnesses requested by the court (which we admit), and that the charges were not withdrawn because the military situation made it impossible to carry on court-martial trials at all, irrespective of the problem of the court-requested witnesses (which we also admit). If this is so, the district judge's decision was based, not on a finding of fact as to the reason for withdrawal different from that of the Court of Appeals, but on an absolute ruling of law (similar to that of the Board of Review) that a proper discontinuance of a court-martial trial cannot, no matter what the circumstances, result from difficulties in making witnesses available at the trial. With this absolute ruling of law, the real crux of the case, the Court of Appeals and we disagree. *Supra* pp. 52-57.[30]

Co. v. *Commission*, 301 U.S. 292, 301-2; *De Célis* v. *United States*, 13 C. Cls. 117, 126; *Cuyler* v. *Ferrill*, 1 Abb. (U.S.) 169, 178-9, Fed. Case No. 3523, 6 Fed. Cas. at 1091 (C.C.S.D. Ga).

[30] Chief Judge Phillips, dissenting below (R. 105-106),

If, however, the District Court did find, as a fact, that the intervening military situation which developed after the trial had nothing substantial to do with the subsequent withdrawal of the charges, its finding was plainly erroneous and entirely unsupported by the only pertinent evidence in the case—the documentary exhibits and the historical facts of which notice should have been taken.[31] The Court of Appeals could rightfully disregard such a finding, particularly since the record contained no relevant testimony and the appellate tribunal was in the same position as the trial court to draw inferences and conclusions from the documentary material and the facts to be judicially noticed. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; ALI, Model Code of Evidence, Rule 806 (appellate court may notice facts judicially).[32] The

---

seems to us to have based his decision on the same absolute ruling concerning the absence or unavailability of witnesses, rather than on a true finding of fact that the tactical situation did not enter into the military commander's determination. Petitioner, of course, supports the same position: "*Whatever the underlying cause*, the absence of witnesses is not ground for the termination of a trial so as to sanction a second prosecution for the same offense." (Pet. Br. 19, italics supplied).

[31] The court's pointed reference, in connection with its discussion of the reasons for the withdrawal, (R. 25) to "the record with reference to the closing and reopening of the case" (i.e., the closing of the first court-martial for deliberation and its reopening to request the additional witnesses) indicates that it may incorrectly have taken the reason for the continuance of the trial as synonymous with the reason for the later withdrawal of the charges, without considering the intervening military events.

[32] The outline map appended to this brief was also pre-

determination by the court below on this point (R. 101) was the only permissible one, in view of the Commanding General's explicit reference to the "tactical situation." *Supra* pp. 5, 45-48.

3. Petitioner goes further and challenges the existence of the military necessities on which the Commanding General of the 76th Division based his determination of withdrawal (Pet. Br. 12, 17, 26-27). The burden of proof rests upon petitioner (*supra* p. 56, fn. 24), and in a habeas corpus proceeding that burden requires him to show that the military commander's determination amounted to an abuse of discretion (*supra* pp. 51-57). But no proof at all has been presented, and even here petitioner does not suggest any substantial basis for impugning the Commanding General's decision. On the contrary, that determination appears to have been not only reasonable but correct.

B. In our view, the facts of the 76th Division's advance across Germany, schematically portrayed in the Appendix, are matters of history to be judicially noticed (*supra* p. 61). In any event, these facts were presented to the District Court in respondent's motion for reconsideration (R. 26-9), which should have been entertained. The trial court denied the motion on the ground that it had no jurisdiction, since motions for a new trial must be filed no later than ten days after judgment, under Rule 59(b), F.R. Civ. P., and this motion

---

sented to the Court of Appeals. A more detailed map appears at R. 30.

came a month later (R. 31, 94, 95; *supra* pp. 10-11). But this is a habeas corpus proceeding and Rule 81 (a) (2) makes the civil rules applicable, except on appeal, only to the limited extent they reflect pre-existing practice. Cf. *Holiday* v. *Johnston*, 313 U. S. 342, 350-353; *United States ex rel. Jelic* v. *District Director of Immigration*, 106 F. 2d 14, 20 (C.A. 2); *Albert ex rel. Buice* v. *Patterson*, 155 F. 2d 429, 433 (C.A. 1), certiorari denied, 329 U. S. 739. The prior practice in habeas corpus permitted a district court to set aside its judgment during the term of court (*Tiberg* v. *Warren*, 192 Fed. 458 (C.A. 9); *Aderhold* v. *Murphy*, 103 F. 2d 492 (C.A. 10)), which had not yet expired in this case. Judicial Code, sec. 82, formerly 28 U.S.C. 157; R. 2, 26.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

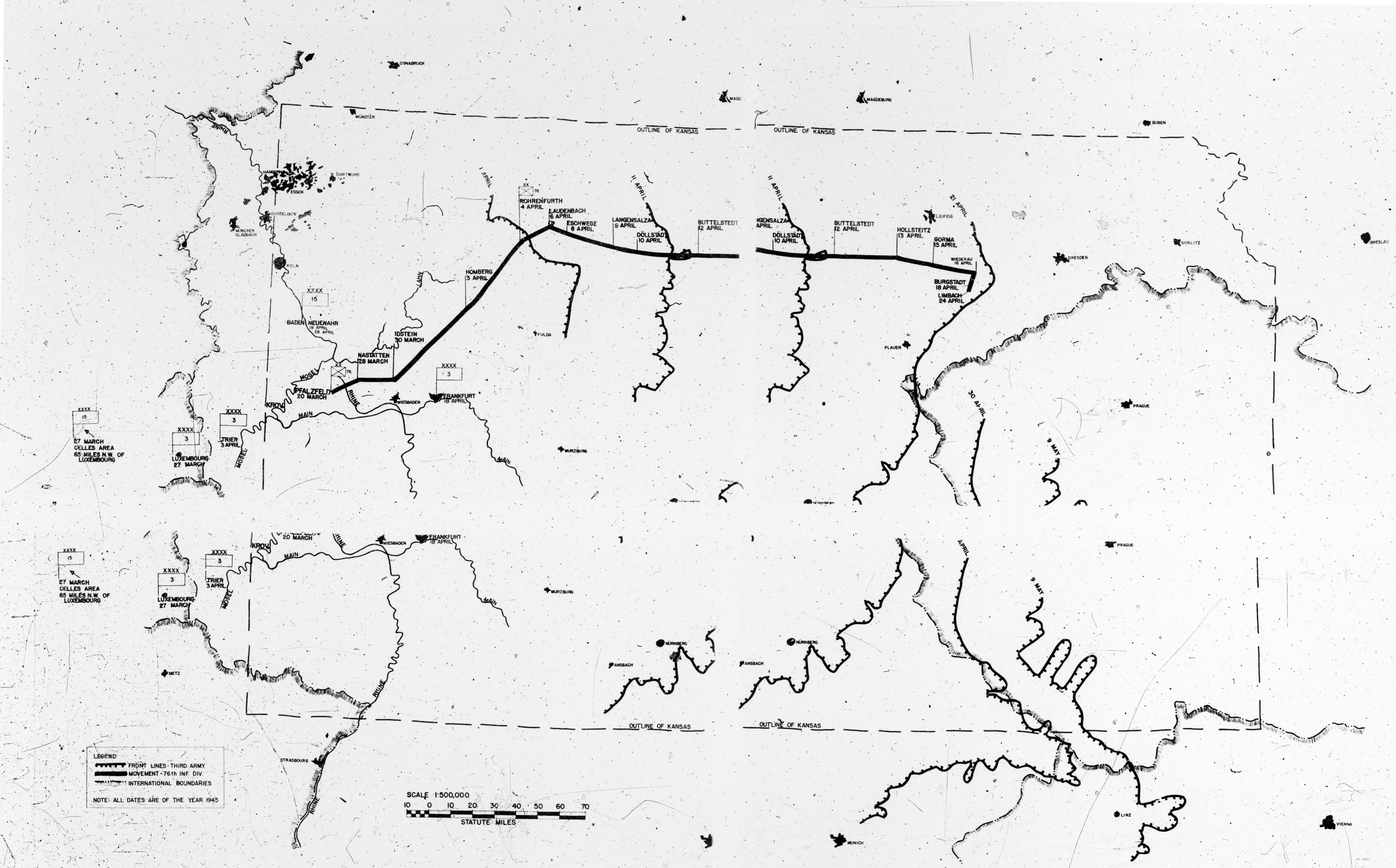
ALEXANDER M. CAMPBELL,
Assistant Attorney General.

OSCAR H. DAVIS,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
JOSEPH LANGBART,
Attorneys.

FEBRUARY 1949.

☆ U. S. Government Printing Office, 1949 · J825936/429


OSNABRUCK
MUNSTER
OUTLINE OF KANSAS
MAGDEBURG
GUBEN
GORLITZ
BRESLAU
DRESDEN
PRAGUE
LEIPZIG
DORTMUND
ESSEN
DUSSELDORF
MONCHEN GLADBACH
KOLN
XXXX 15
BADEN NEUENAHR 19 APRIL 29 APRIL
XX 76
ROHRENFURTH 4 APRIL
LAUDENBACH 6 APRIL
ESCHWEGE 8 APRIL
HOMBERG 13 APRIL
IDSTEIN 30 MARCH
NASTATTEN 28 MARCH
PFALZFELD 20 MARCH
KROV
MOSEL
RHINE
MAIN
FULDA
WURZBURG
WIESBADEN
FRANKFURT 18 APRIL
XXXX 3
TRIER 3 APRIL
LUXEMBOURG 27 MARCH
27 MARCH CELLES AREA 65 MILES N.W. OF LUXEMBOURG
I APRIL
II APRIL
LANGENSALZA 9 APRIL
DÖLLSTADT 10 APRIL
BUTTELSTEDT 12 APRIL
HOLLSTEITZ 13 APRIL
GORMA 15 APRIL
WIEDERAU 16 APRIL
BURGSTADT 18 APRIL
LIMBACH 24 APRIL
21 APRIL
30 APRIL
9 MAY
PLAUEN
METZ
STRASBOURG
NÜRNBERG
ANSBACH
MUNICH
LINZ
VIENNA
LEGEND:
FRONT LINES - THIRD ARMY
MOVEMENT - 76th INF DIV
INTERNATIONAL BOUNDARIES
NOTE: ALL DATES ARE OF THE YEAR 1945
SCALE 1:500,000
10 0 10 20 30 40 50 60 70
STATUTE MILES

B.

The opinion of this Court erroneously presupposes that the Commanding General judicially and judiciously determined that there was a manifest necessity for the transfer of charges—but the record, correctly appraised, establishes the non-existence of manifest necessity, that the Commander probably did not cause the transfer, and that if he did he acted not as a court of justice aware of the responsibility to petitioner and the public but as a commander presuming the unlimited power to terminate the trial at his command and convenience at any time prior to finding.

C.

The judgment of this Court deprives petitioner of the right to be heard and to offer evidence on the questions of pure fact upon which the judgment rests, to-wit: that the first order of transmittal (4th endorsement) establishes that the tactical situation required transfer of the charges, that this tactical situation was brought about by a rapidly advancing army, that the court-martial officers were needed to perform their military functions (and could not perform their judicial functions), and, perhaps, that the German witnesses could not be produced before the court-martial—which questions of pure fact were not raised in the second court-martial or in the trial court and therefore were not disproved by petitioner.

PREFATORY STATEMENT.

Innocence of Petitioner.

Petitioner's innocence cannot be inquired into on habeas corpus. However, the question of the invalidity of petitioner's conviction and sentence on the ground that

the constitutional provision against double jeopardy was violated must be examined upon the presumption that petitioner is innocent. In this case there is more than the legal presumption that the first court-martial, if permitted to complete the trial, would have acquitted. The record discloses that the second court-martial convicted by a divided vote (R. 67-68); that it acquitted Cooper who was tried for the first time in a joint trial with petitioner (who was then being tried a second time) (R. 67); that the testimony shows an obvious misidentification of petitioner and that he was not at the scene of the crime (R. 45-60).

Defense counsel appointed by the Commanding General, Fifteenth Army to defend petitioner before the second court-martial, would not have invoked the aid of the great writ of habeas corpus and continued to this date to serve him under the obligation of his appointment (without charge) had he considered him guilty of the offense. Members of the convicting court-martial were distressed at the mistake they made and sought to have the conviction set aside. Seven months before this proceeding was instituted defense counsel sought relief for petitioner in an application to the then Secretary of War and received a response thereto that the Department was powerless to vacate the judgment. This response was in evidence in the District Court.

The Supreme Court in *United States* v. *Perez*, 22 U. S. (9 Wheat) 579, 6 L. Ed. 165, states that courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. The danger of successive trials is the risk that an innocent man will be convicted. That danger justifies the care which this case has received and will receive on this petition for rehearing.

LIBRARY
SUPREME COURT U.S

Office - Supreme Court, U. S.
FILED
MAY 7 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

427

OCTOBER TERM, 1948.

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR REHEARING OF PETITIONER and MOTION TO STAY MANDATE.

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,
N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,
HARRY W. COLMERY,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,
Counsel for Petitioner.

A.

The tactical situation did not require the withdrawal of the charges from the first court martial as stated in the court's opinion.

What does the record show on this question? First, it shows unequivocally that no evidence was offered before the second court-martial and no contention was made at that trial that the tactical situation required the transfer (R. 68-69, 119-127). This is important since had there been such evidence then was the time and there was the place for its production. The prosecutor had known for more than two months that petitioner was claiming former jeopardy, yet he opposed the plea of former jeopardy upon the sole ground that there could be no jeopardy prior to a finding; that the commanding general had the unrestricted power to transfer the case. Under these circumstances was it necessary for defense counsel to have proved that there was no necessity for the withdrawal of the case and its transfer to another court for a trial anew? Was it the responsibility of defense counsel to have established the absence of every ground upon which the termination of the first court-martial trial would have justified a retrial without violation of the Fifth Amendment of the Constitution? If so, defense counsel would have been compelled to show the absence of countless possibilities, the non-existence of a wide variety of situations which the courts have held or might hold constitute imperious necessity for termination. The reason that neither defense counsel nor the prosecution nor the second court-martial considered the possibility that the case was withdrawn for necessitous reasons lies in an appreciation of how an infantry division operates in time of war, and how a court-martial operates in a division.

An infantry division consists of some 14,000 men, of whom about 800 are officers. It has three infantry regiments, four artillery battalions and various other units. The division commander has a large general and special staff. The division judge advocate is a member of his staff. He has an assistant, several enlisted men, and these constitute the legal department of the division. The division has some 2,000 vehicles and about ten liaison planes, but the division is not mounted. The troops march on foot. The average length of march for a division on roads is twelve to fifteen miles per day, which may be extended by forced marches perhaps to twenty-five miles per day. If the division meets resistance requiring deployment from the roads or fighting, ordinarily its daily advance is measured in yards and not miles. Foot troops do not race across country occupied by a fighting enemy. If an infantry division moves rapidly, it is riding in trucks, in which case the enemy is not opposing the movement. That a division is committed to action does not mean that its 14,000 members fight, or even that a majority of them engage in shooting the enemy. In time of war a division does not fight day after day. In a campaign it is committed and relieved, and is in action and out of action intermittently. It is not normal for a division to be in an attack situation for an extended consecutive period. An attack situation is not synonymous with a tactical situation. A division may be in a tactical situation without being in contact with the enemy. A division in time of war is in a continuous tactical situation. In military parlance the phrase "tactical situation" neither denotes nor connotes actual combat.

In military organizations the actions taken are in the name of the organization commander. This does not mean that the commander has knowledge of that which is done in his name. It is common practice for orders to be issued and endorsements made for the commanding general with-

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR REHEARING.

Frederick W. Wade petitions the Court for a rehearing upon the following grounds:

A.

The major premise upon which the Court's judgment is founded—that a tactical situation, brought about by a rapidly advancing army, required the withdrawal of the charges from the first court-martial—is not supported by the record and is contrary to the record, and is based upon a misunderstanding of the military situation and the way a Division court-martial functions in a military situation.

out prior knowledge or examination or consideration upon his part. Administrative matters of a routine nature are handled by the administrative staff without reference to the commander. A division, being a large unit, occupies a large area, whether it is at rest or on the march or in action. It ordinarily has several headquarters, a headquarters for conduct of tactical training or operations and a headquarters for administrative matters, such as supply, finance, personnel, military justice. The adjutant general section and the judge advocate section is at the administrative headquarters located anywhere from ten to twenty-five miles from the tactical or operational headquarters. The commanding general normally is at the tactical headquarters. The paper work is performed at the administrative headquarters. A division commander has power to appoint courts-martial and to refer cases to it for trial. However, military justice is handled by the judge advocate section and as a practical matter the judge advocate selects the members of the court and prepares the cases for it. The order appointing the court usually provides that it shall meet at a certain time or as soon thereafter as practicable for the trial of such persons as may be properly brought before it. The time and place of meeting is ordinarily determined by the president of the court in consultation with the trial judge advocate and at the convenience of members of the court. Members of the court do not devote their exclusive time to court matters, but continue to carry on their normal duties. If their services are needed elsewhere, they may be excused, or if the court has entered upon the trial of a case, the trial may be adjourned to a time convenient for the members of the court. The flexibility of courts-martial as to the time and place of meeting, continuances and adjournments, makes unnecessary the withdrawal of a case once commenced before it. A tactical situation can hardly be conceived which would require the withdrawal of a case

from a general court-martial after trial has commenced. Moreover, the members of military organizations located in Germany during the war and after the war were familiar with the progress of the war and knew that after the Battle of the Bulge, which was won in January, 1945, the "momentous issues" had been resolved and that the conclusion of the war was a matter of a short time. They knew that the success of the allied armies on both the western and eastern fronts was decisive and that the resistance of the German armies crumbled. They knew that if a court-martial trial could be conducted by the 76th Division on March 27, 1945, it certainly could be completed after that date. No tactical situation developed to prevent it.

Second, the 4th indorsement (described in the opinion as the first order of transmittal of the charges) does not indicate that the tactical situation required the transfer of the case. The only thing left to be done on March 27, 1945, was to hear the three witnesses requested by the court and to decide the case on the evidence. The trial judge advocate was responsible for the production of these witnesses, who lived in Krov, Germany, twenty-two miles from Pfalzfeld, where the court saf on that date. The court set no time or place for the production of these witnesses, leaving that to the trial judge advocate who would have consulted with the president of the court and its members to assure a convenient time and place of the meeting. We do not know what effort, if any, was made to secure these witnesses during the period March 27th to April 3rd. The indorsement recited that due to the tactical situation the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. "Tactical situation" clearly refers to the movement of the division, and of

course the court which adjourned the trial knew that the division would move. It had moved in the past and it would move in the future. While the location of a division cannot be pin-pointed at one place, let us assume for argument that the division was at Pfalzfeld on March 27th and at Homberg on April 3rd, eighty miles beyond Pfalzfeld. If the two or three German witnesses could be brought from Krov to Pfalzfeld, why could not they be brought from Krov to Homberg, some eighty miles farther? How much longer would it have taken the trial judge advocate to have transported two or three persons an additional eighty miles? Will this court say that this change in distance justified the transfer of the case under the doctrine of *United States* v. *Perez, supra?* Supposing in the Perez case, after the government and defense rested, the court indicated it desired three additional witnesses produced and directed the prosecutor to bring them in; that one week later the prosecutor reported to the court that the witnesses had moved in that week eighty miles farther from the court; and that thereupon the trial judge declared a mistrial and announced the case would be retried at the term of court sitting nearer the witnesses. Would not a second prosecution violate the Fifth Amendment against double jeopardy?

What is the significance of the phrase "the case cannot be completed within a reasonable time"? It is a conclusion, clearly false. To state that witnesses cannot be moved 102 miles in a reasonable time is to state a palpable falsehood. Moreover, what constitutes a reasonable time to complete the case depends upon a comparison of the length of time required to complete the case as against the length of time it would take to try the case anew at a place nearer Krov. The case was tried at Bad Neuenahr, Germany, some 45 miles from Krov, on

June 30, 1945, almost three months after the case was withdrawn. Witnesses, of course, had to be brought from the then location of the 76th Division in the Grimitchau area, some 260 miles from Bad Neuenahr, but this increased distance between court and witnesses was not a factor accounting for the lapse of time. But if distance were a true factor as asserted in the 4th indorsement, it would have been a true factor to consider in determining whether an earlier trial could be had if the case be transferred. In other words, if the distance to the residence of the German witnesses had become so great that the case could not be completed within a reasonable time at the situs of the 76th Infantry Division court, then the distance to the location of the American witnesses, members of that division, had become so great that the case could not be completed within a reasonable time at the situs of another court closer to the residence of the German witnesses. Is there any wonder that the prosecution did not attempt to prove the assertions in the 4th indorsement?

But the Court of Appeals and this Court looked beyond this specious reason assigned in the 4th indorsement and assumed that the tactical situation did more than change distances. This court stated "Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions." We do not ask this court to assume that, but we do ask the court not to assume that the completion of the case would have prevented the members of the court-martial from performing their military functions. Can this court assume upon this record that the members of the court could not have devoted the one or two hours necessary to the completion of the case on April 3, 1945, or on any day within a reasonable time thereafter? One week earlier they devoted an entire day to this case. Can

the court assume that there was a greater need for their services because progress was easier and the end of hostilities was in sight?

Certainly there is no evidence in this record from which it can be inferred that the court-marital officers could not have completed the first trial because their services were needed elsewhere. Moreover the high duty of securing justice for petitioner under the Constitution was of equal importance with the other duties imposed upon these officers.

We have demonstrated that the 4th indorsement does not establish that the tactical situation required the transfer order. What else in the record is there? There is the dissenting opinion of the assistant judge advocate general (R. 78-87). It is not evidence, but we examine it nevertheless. He suggests that the commanding general was called upon to determine "not only how these witnesses would be produced but also whether it was advisable to bring them to the place of trial"; the expediency of transferring them from their homes, a considerable distance in time of combat; feeding and billeting problems; and use of personnel in the effort (R. 84-85). He asserts that German witnesses were not subject to subpoena and that "in Germany the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror" but "practical considerations weighed heavily against theoretical possibilities"; that "it is a matter of notorious knowledge that the ordinary means of travel in Germany were disrupted and in some areas destroyed" (R. 81-82). Anyone who served in Germany would know that these conjectures were baseless. The roads were good and open. We supplied some sixty divisions and supporting troops with supplies transported over them. German civilians were most obedient to command. There was no combat situation

between Krov and the 76th Division. In any event the problem, if any, was no different on April 3, 1945, when the case was transferred, than it was on March 27, 1945, when German witnesses were produced at the trial in Pfalzfeld.

Then there is the motion for reconsideration with attached map. It is not evidence, but we shall examine it. For brevity we will limit our examination to the map which was used by respondent at the oral argument. Demonstrably it is an amazingly incomplete and misleading document. Where were the other 59 American divisions, cavalry groups, the British, French and Russian armies? Where are the German forces, if any, that opposed (if they did) the advance of the 76th Division?

What was the enemy situation after March 27, 1945, as compared to the enemy situation before that date? Where were the various headquarters of the 76th Division, the forward headquarters and the rear headquarters? When and how did the division move? Certainly the Government must know the true facts in this case. The Government has available the daily situation reports, the after-action reports and the casualty reports of the 76th Division. The Government must know who authored the 4th indorsement and has probably obtained statements from the commanding general, division judge advocate and trial judge advocate. We do not pretend to know at this time why the case was transferred or who was responsible for its transfer. We do know it was improvidently transferred. Since the commanding general and his staff apparently assumed the unrestricted power to transfer the case without regard to the Fifth Amendment of the Constitution (the assumption relied on in the second prosecution) it can hardly be assumed that they weighed the rights of petitioner under the Constitution against the question of mani-

fast necessity and public justice. There was no legitimate reason for the transfer, but there are three possible explanations for it which may be inferred from the record. One is that the instigator of the withdrawal believed that the court-martial would not convict. Another is that the instigator did not want to try the Cooper case, a companion case, so he caused both petitioner's and the Cooper case to be transferred. The third is that the prosecutor went to Krov to check on the witnesses and recognized that the father and mother of the alleged victim were old and senile and incompetent witnesses and took the means of the transfer to avoid compliance with the order of the court.

B.

The Commanding General did not judicially or judiciously determine that there was a manifest necessity for the transfer of charges from the first court-martial.

We have already shown under Point A that the record, properly appraised, establishes the non-existence of manifest necessity and indicates that the Commanding General himself was not responsible for the content or effect of the 4th indorsement as a means of initiating a second and unlawful court-martial trial.

But assuming that what was done *for* him was done *by* him, this action was not the act of a court of justice, judicially applying the standards stated in *United States* v. *Perez, supra*.

The Commanding General appointed the court-martial and he was vested with power to review its judgments. But he was not a member of the court-martial and that tribunal, a court of justice, had exclusive jurisdiction to determine initially as the trial court whether a mistrial on the ground of imperious necessity was proper. To permit

the Commanding General to usurp this function inherent in the court is to destroy the safeguard that was petitioner's right. Courts are open and open to public scrutiny. They judge in the presence of defendant and his counsel. Not only is the Commanding General not a part of the Court but he is a part of the prosecution. He initiates the prosecution, determines in advance of reference that the case should be prosecuted. The Commanding General, Division Judge Advocate, and trial Judge Advocate are the prosecuting team. The members of the court-martial take the oath and are the impartial judges. The Commanding General takes no oath. Commanding Generals have attempted to influence courts appointed by them. So flagrant did this become that the Congress enacted Article of War 88 (10 U. S. C. A., Sec. 1560) which expressly forbids the Commanding General from censuring a court-martial with respect to any exercise of its judicial responsibility.

The Commanding General has the right to withdraw a case at any time prior to finding. But this right vests in him no power to withdraw a case for the purpose of retrial on the ground of imperious necessity or otherwise.

The Attorney General may withdraw a case from a federal criminal court. The President, the Commander-in-Chief, may order him to do so. But this does not authorize the Attorney General to exercise the judicial power to withdraw a case from a duly constituted court for the purpose of a second prosecution after jeopardy has attached, on the ground of imperious necessity.

The fact that the Commanding General "convened" the court, that is, directed that the members meet, did not place him in a position relative to the court-martial that a presiding judge holds with respect to a criminal court. We can see no analogy whatsoever.

C.

The judgment of this Court deprives petitioner of the right to be heard and to offer evidence on the new questions of pure fact upon which the judgment rests.

At the time petitioner filed his habeas corpus petition and up to a few days before the hearing he was wholly unaware that the doctrine of imperious necessity had been injected into his case on military review. The Government had refused him the opinions in his case until immediately before the trial (R. 6, Pars. 22, 34).

The 4th indorsement was not a part of the second court-martial record (R. 68-69).

As heretofore pointed out, the second court-martial denied his plea of former jeopardy on the sole ground that his first court-martial trial had not reached the finality necessary to place him in jeopardy.

At the habeas corpus trial, respondent limited the issue of imperious necessity to the question whether the combat situation in the locality of Pfalzfeld authorized the application of the doctrine (R. 40, 1). Petitioner had no notice that this unsworn, *ex parte* document (inadmissible under military law[1]) would be given the effect of a judgment.

After judgment, respondent filed its motion for reconsideration seeking permission to present evidence that the tactical situation arising in the final six weeks of the war was the cause of the withdrawal of the case (R. 26). The trial court refused to entertain this motion as coming too late (R. 31). Consequently, petitioner offered no evidence to rebut the motion.

---

[1]Manual for Courts-Martial, 1928, p. 114, Par. 113b; 1949, p. 156, Par. 126b.

The Court of Appeals and now this Court have found that the tactical situation brought about by the rapid advance of the army required the withdrawal. And the Government, having discarded the point that combat prevented the completion of the court-martial trial, in its brief and oral argument, suggested that the Commanding General had the problem of weighing many factors: How the witnesses would be produced, whether it was advisable to bring them to the place of trial, distance, combat, the admonition of Theater Headquarters that the trial of certain offenses should be held in the immediate vicinity of the offenses, the problem of guarding the accused. We submit that statements of counsel are not a substitute for proof.

Petitioner concedes that he was unequal to the task of anticipating and disproving before the second court-martial matters first suggested on military review. He concedes that he was unequal to the task of anticipating and disproving in the trial court on habeas corpus matters first suggested in appellate courts.

These matters can be disproved.

Petitioner is entitled to an opportunity to disprove them. The true facts rather than assumed facts may then prevail.

CONCLUSION.

The majority opinion of the court presupposes that the commanding general withdrew the charges from the first court-martial and transferred them for the purpose of a second trial after a careful and judicial determination that the tactical situation required this action because it was manifestly necessary or the ends of public justice required it. The court states that this tactical situation was brought

about by a rapidly advancing army; that momentous issues hung on the invasion and that it cannot be assumed that the court-martial officers were not needed to perform their military functions.

But at the time the issues were made up and tried out in the trial court on habeas corpus, the Government took the position that the combat situation at Pfalzfeld, Germany, on April 3, 1945, made necessary the termination of the first court-martial trial prior to completion and limited the issue of imperious necessity to that single and simple point. However it did not prove that point and petitioner had the right to assume that the court would resolve the issue of imperious necessity against the respondent. The court did so resolve that issue. Thereafter respondent filed a motion for reconsideration in which he asked that the case be reopened for the introduction of further evidence, not upon the point that the state of combat at Pfalzfeld on April 3, 1945, prevented the completion of the first court-martial trial, but upon the ground that the rapid movement of the 76th Division in the final six weeks of the war necessitated the termination. Petitioner was not called upon to meet this new contention as the trial court refused to entertain the motion because it was filed beyond the time allowed by the rules of civil procedure. It is largely upon these new grounds that this court has affirmed the judgment of the Court of Appeals, thereby depriving petitioner of the opportunity to disprove them, an opportunity which he would have had if the trial court granted the motion for reconsideration. We believe that the record made in the trial court, interpreted with a proper appreciation of military terminology, military operations and the administration of military justice and within the confines of issues made in the trial court, requires a rehearing and a reversal of the judgment of the Court of Appeals.

However, common fairness, aside from any procedural rules, dictates that before the new issues of fact upon the question of imperious necessity—namely that the tactical situation brought about by rapidly advancing army and the possibility that the court-martial officers were needed to perform their military functions and could not complete the first court-martial trial, or perhaps that the movement of the division made it impossible or impracticable to obtain the testimony of the German witnesses—be determined against petitioner, he should be given an opportunity to be heard and to offer evidence to refute these appellate findings which he believes to be unwarranted assumptions of fact.

We respectfully submit that a remand of this case to the District Court with directions to develop and determine the facts is the only alternative to a reversal of the judgment of the Court of Appeals which will serve the ends of justice.

Respectfully submitted,

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,

HARRY W. COLMERY,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is filed in good faith and not for purposes of vexation or delay and is believed by us to be meritorious.

R. T. BREWSTER,
N. E. SNYDER,
HARRY W. COLMERY.

MOTION FOR STAY OF MANDATE.

Frederick W. Wade moves that the mandate in this case be stayed pending the determination of the petition for rehearing.

Petitioner was released from the custody of respondent in May, 1947, and since said time has been at home with his family. He has a wife and two children, one of whom was born since his release.

Respectfully submitted,

R. T. BREWSTER,
N. E. SNYDER,
HARRY W. COLMERY,
Attorneys for Movant.